TRANSCRIPT OF RECO

SUPREME COURT OF THE UNITED STATES.

No. 941.

THE CITY OF MEMPHIS ET AL., PLAINTIFFS IN ERROR,

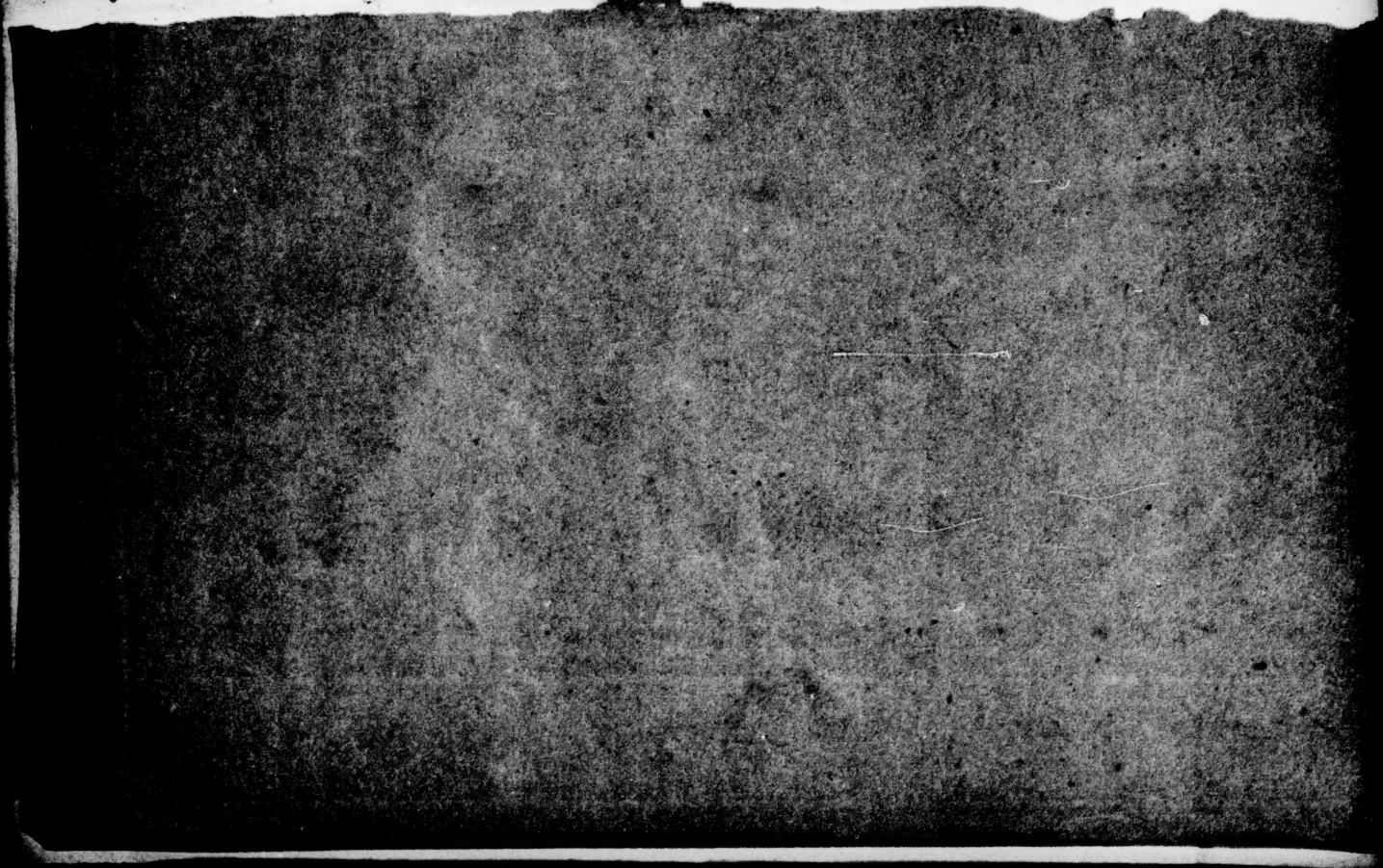
vs.

THE UNITED STATES, EX REL. TALMADGE E. BROWN.

PHILADELPHIA BAR ASSOCIATION

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED OCTOBER 22, 1877.



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United States Circuit Court, Western District of Tennessee.

Proceedings had in the Circuit Court of the United States for the sixth judicial circuit thereof, western district of Tennessee, at a regular term of said court, begun and held for its November term, A. D. 1874, at the federal court rooms in the city of Memphis, on, to wit, the 22d day of March, 1875, and days subsequent thereto, in the following cause:

U. S. Circuit Court, District West Tennessee.

THE UNITED STATES, ON THE RELATION OF T. E. BROWN,
vs.
THE CITY OF MEMPHIS.

1 *Petition for Mandamus.* Filed March 22, 1875. H. E. Andrews, Clerk.

U. S. Circuit Court, District West Tennessee.

THE UNITED STATES, ON THE RELATION OF T. E. BROWN,
vs.
THE CITY OF MEMPHIS.

To the Honorable Judge of said court.

And your petitioner represents and shows to the court that in the year A. D. 1867, the city of Memphis, under the provisions of an act of the legislature of the State of Tenn., contracted with the firm of Taylor, McBean & Co., made up of Abner Taylor, A. G. McBean, and Alexander McBean; also contracted with the firm of Forest, Mitchell & Co. for paving certain of its streets with what is
2 know as the Nicholson pavement, and undertook to charge the cost thereof to the owners of the abutting property, proportioning the same according to the frontage of each lot, and to require that the owners of the same should pay such costs as debts contracted by themselves. Petitioner further alleges that said parties entered upon this said work under said contracts and completed portions of the same, and that subsequently, in the year 1868, the firm of T. E. Brown & Co., composed of T. E. Brown and J. Langden, succeeded to all the rights of all of said contracting parties with the city of Memphis, and completed the same fully, and to the entire satisfaction of said city, and the same was thereupon accepted by the city. Petitioner further alleges that the property-owners paid a part of the cost of said work, but a great many of them refused to pay, and a large amount being due and unpaid, bills were filed for the recovery of the same in the court of chan-
3 cery, so contemplated by the said act of the legislature, and decrees were thereon rendered, and the cases were taken by appeal to the Supreme Court of Tennessee. Wherein upon final hearing it was decided that the city had no power to make the

abutting property-owners pay the costs of said work, and discharged the said owners from the payment of said liabilities.

And petitioner alleges that he, as surviving partner, brought suit on said contracts against said city in this court for the upaid portions of said work, and that such proceedings were had that a decree was rendered by this court in his favor against said city, on the — day of March, 1872, for a balance of $448,993 besides costs. The cause was taken by appeal to the U. S. Supreme Court, and where the decree of this court was pronounced correct, except in certain particulars, and the cause was remanded to this court
4 with instructions to render a decree in favor of petitioner in accordance with the opinion of the court. And on the 15th day of March, 1875, in pursuance of the said mandate, a decree was rendered in this court in favor of *said* Talmadge E. Brown and against the city of Memphis, in the sum of $292,133.47 and the costs of the suit, and that execution issue therefor instanter. Petitioner alleges an execution has issued on the said decree and has been returned no property found out of which to make said judgments. And the city has no money with which to pay the same, and no property out of which it can be made, all of its property being exempt from execution and sale thereunder. And the city has no means with which to pay the said judgment save and exempt by levying a tax upon all of the taxable persons and property within its limits for this purpose.

5 Plaintiff alleges that in addition to the city's other powers of taxation, the legislature of the State of Tennessee, on the 18th day of March, 1873, by an act then passed, enacted, among other things, as follows, to wit: An act to amend the charter of all the incorporated towns and cities in the state.

Section 1st. Be it enacted by the general assembly of the State of Tennessee, that where any incorporated town or city has, by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes, or special assessments, the right to make which levy and assessments was afterwards declared void by the supreme court of the state, said town or city shall have the power to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient to cover the entire costs of the improvements with interest thereon, for which said special assessments were illegally made, &c., &c. And petitioner avers that the debt so
6 due him, as appears by the said decree, occurred in the manner contemplated by the said act. That is to say, the same was incurred by the city of Memphis as a part of this entire cost of paving portions of the public sts. of the city, which paving was done under contracts made in pursuance of ordinance of the city & acts of the legislature of the state, whereby the city undertook and assumed to levy and collect from the property abutting the streets on which the paving was done the costs thereof, and after the said paving was done and accepted, as hereinbefore stated, and before

the said 18th day of March, 1873, the Supreme Court of the State of Tennessee decided that no right or power to make the said levy or assessment existed, and that the attempt to make the same was void. For particularity as to all the matters herein stated the petitioner refers to the records and proceedings in the said cause, in
7 which he recovered the said decree now on file in this court, and prays the same may be considered as a part of this petition. Petitioner alleges that he is a citizen of the State of Iowa, and that the respondent is a citizen of the State of Tennessee.

Pltff. says that, notwithstanding said act of legislature and the respondent's general power of taxation, and the fact that plaintiff has frequently demanded the payment of his said debt and a levy of a tax sufficient in amount to pay his said decree, the city has failed either to pay the same or to levy a tax sufficient for the purpose, and neglects and refuses to do so. Plff. alleges that the Hon. John Loague is the mayor of Memphis, and the following named persons constitute the general council of the city of Memphis, to wit:

Board of councilmen.—P. J. Kelly, Herman Caro, Wm. Hewett, S. J. Camp, Alf. G. Tuther, S. W. Green, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D.
8 Danbury, H. Luhrman, Joseph Clouston, Richard Doherty, Wm. Gay, L. D. Grant, Jacob Moon, T. A. Ryan, John Zent.

Board of aldermen.—Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, J. Happeck, J. T. Hillsman, A. T. White, M. J. Doyle, G. A. Morti, S. B. Robbins.

In consideration of the premises the petitioner prays that an alternative writ of mandamus issue, returnable on the 26th day of March, 1875, requiring the city of Memphis and the said mayor and general council to pay immediately to petitioner the amount due on said decree, including interests and costs, or in default thereof to levy each year for the ensuing years, to wit, 1875, 1876, and 1877, a tax in addition to all other taxes sufficient in amount, after making due allowance for all delinquencies, insolvencies, and defaults,
9 to realize $25,000 each year, and to pay over the same to said Talmadge E. Brown as fast as collected, or so much thereof as may be necessary for the purpose of satisfying this decree, or show cause to the contrary; and for such further, other, and different order in the premises as to this honorable court may seem fit and proper, and your petitioner will ever pray, &c.

T. E. BROWN, *in person.*

SHELBY COUNTY, TENNESSEE.

T. E. Brown, the relator in the foregoing entitled action, being duly sworn before me the undersigned, deposes and says that the allegations in this petition are true, as he verily believes.

T. E. BROWN.

Subscribed and sworn to before me, this 22 day of March, 1875.

LEONARD H. PILLSBURY,
U. S. Commr. D. W. T.

10 *Order for Alternative Writ.*

In consideration of the petition which is now filed the clerk will issue the alternative writ of mandamus, as prayed for in the foregoing petition, returnable on the 26th day of March, 1875, at 10 o'clock a. m.

March 22d, 1875.

11 United States Circuit Court, Western District of Tennessee.

Proceedings had in the ——— court of the United States for the sixth judicial circuit thereof, western district of Tennessee, at a regular term of said court, begun and held for its ——— term, A. D. 187–, at the federal court rooms in the city of Memphis, on, to wit, the — day ——, 187–, and days subsequent thereto, in the following cause:

Writ of Mandamus.

Iss'd March 22, 1875. Ret'd and filed June 1st, 1875.

UNITED STATES OF AMERICA,
DISTRICT OF WEST TENNESSEE.

The President of the United States, the city of Memphis, John Loague, mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. S. Dent, J. Happeck, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, and S. B. Robbins, constituting the board of
12 aldermen.

And P. J. Kelly, Herman Caro, William Hewett, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luehman, Jas. Clouston, jr., Richard Doherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. G. Grant, Jacob Moore, T. A. Ryan, and John Zent, constituting the common council of the city of Memphis, together composing the general council of the said city, greeting: Whereas, by a petition, duly sworn to, filed in court here, it appears that on the 16th day of March, 1875, Talmadge E. Brown recovered in this court, on the equity side, of the city of Memphis the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents, $292,133.47, and the costs of the suit, and that execution was ordered forthwith to issue therefor, and that the said execution has been duly issued and has been returned with the
13 return of the marshal endorsed thereon, after diligent search no property to be found, returned without being further satisfied, by order of attorney for plaintiff. And it appearing that the said city has no money with which to pay the said decree, and no property out of which it can be made, and has no means of paying the said decree except by levying a tax upon all taxable persons and property within the city, and that the debt for which the said decree was so pronounced accrued and became due from the city of Mem-

phis as a part of the entire cost of paving portions of the public streets of the city, which paving was done under contracts made by the city in pursuance of ordinances of the city and acts of the legislature of the State of Tennessee. Whereby the city undertook and assumed to levy and collect from the property abutting the streets in which the paving was done, the costs thereof, appertaining the same according to the frontage of the property on the streets paved. And after the said paving was done and accepted, and portions
14 of the assessments levied for the payment of the cost thereof had been collected, and whilst a large balance of the cost thereof remaining due and unpaid, and before the 18th day of March, 1873, the Supreme Court of the State Tennessee decided that no right or power to make the said levy or assessments to pay for the said costs of the said pavement existed by law, and that the attempt to do so was void, and that by the act of the legislature of the State of Tennessee, passed on the 18th day of March, 1873, entitled an act to amend the charters of all the incorporated towns and cities in the state, as well as by other laws, full power and authority is given to the general council of the city of Memphis to levy and collect a tax in addition to all other taxes authorized by law to be levied, and sufficient in amount for the sole and exclusive purpose of paying the entire cost of the said pavement so laid down, including the amount of the said decree, and that the city of Mem-
15 phis and its general council, though often requested so to do, has wholly failed to levy the tax to pay the said decree, or any part thereof, or otherwise to pay the same.

Now, therefore, this is to command you, the city of Memphis, and you, the said mayor, and you, the said members of the board of aldermen and common council and general council, that you pay immediately, in accordance with a decree of the court entered herein on the 16th day of March, 1875, the amt. of the decree aforesaid and the interest thereon and the costs of the suit, and in default thereof that you proceed to levy and collect each year for the ensuing 3 years, to wit, 1875, 1876, 1877, respectively, a tax in addition to all other taxes, sufficient in amount, after making due allowance for all delinquencies, insolvencies, and defaults, to realize one hundred and twenty-five thousand dollars ($125,000) each year, and to pay over the same in accordance with the decree of this court
16 entered herein March 16th, 1875, as fast as collected, or as much thereof as may be necessary for the purpose of satisfying the said decree, including the interest thereon and the costs, or appear in court here at 10 o'clock a. m., on Friday, the 26th day of March, 1875, and show cause, if any you have, why you should not be required by the judgment of this court to do so.

And this you shall in no wise omit, and do you then and there make due return of this writ.

Witness Hon. Morrison R. Waite, Chief Justice of the United

States, and the seal of the circuit court aforesaid and the signature of the clerk, this 22d day of March, 1875.

(Signed) H. A. ANDREWS, *Clerk.*

Attest: L. B. EATON,
United States Marshal.

Executed by delivering the original writ, of which this is a true copy, to his honor, John Loague, the mayor of the city of
17 Memphis, and by making known the contents and delivering a copy of the original writ hereof to Owen Dwyer, C. W. Metcalf, H. G. Dent, J. Happeck, J. L. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, and L. B. Robbins, members of the board of aldermen of the city of Memphis, and in like manner to P. J. Kelly, Herman Caro, Wm. Hewett, L. J. Camp, Alf. G. Tuther, L. W. Green, H. Luehman, Jos. Clouston, jr., Richard Dougherty, William Gay, Chas. G. Fisher, L. Robbins, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moore, T. A. Ryan, and John Zent, members of the common council of the city of Memphis, all on March 24th, 1875. After diligent search Nick Malatesta, alderman, and J. L. Carpenter, councilman, not being found, I executed this writ upon them by leaving copies hereof at the last place of residence of each of the last two on March 25th, 1875.

L. B. EATON.
W. KOCH, *Deputy.*

17 *Answer.*

TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS, JOHN LOAGUE, Mayor, Owen Dwyer, et al., composing genl. council.

Now came John Loague, mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, J. Happeck, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, and S. B. Robbins, of the board of alderman, and P. J. Kelley, Herman Caro, Wm. Hewett, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luehrman, Jos. Clouston, jr., Richard Dougherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moore, T. A. Ryan, and John Zent, of the board of councilmen, and altogether composing the general council of the city of Memphis, and make return to the writ of man-
19 damus, nisi issued out of this honorable court, and not having obeyed the same they respectfully show the following reasons or causes why they have not done so: First, there is no money in the treasury, and the general council of the city of Memphis has no power under the charter of said city to levy a greater tax than one per cent., or one dollar on the $100 of taxable property for all the

purposes of government, including officers' salaries, police, fire, health, and hospital departments, and the other current expenses of the city government, including the repair and improvement of streets, alleys, wharfs, &c., &c., and they have power to levy other taxes, as follows:

2 mills per cent. for interest on bonded debt of the city.
2½ " " " sinking fund to retain the bonds of the city school.
1 " " " school, and
½ " " " judgments.

But the last-named special taxes are required by law to be strictly applied for the purposes for which they are allowed to be levied, and therefore they could not be applied to relator's claims. It is also made a misdemeanor for the respondents to apply said funds for any other than the purposes named by the law. The one per cent. which the respondents are allowed to levy for general purposes, they have already imposed, and therefore have exhausted their powers of taxation.

The act passed by the legislature of Tennessee, March 18, 1873, has since been repealed, and is not now the law of the state. Respondents cannot now give the date of the act referred to in relator's petition, but it was passed at the present term of the legislature, though not yet published.

Second. That the writ commands these respondents to levy a sum sufficient to raise $125,000 each year for three years, to wit: the years 1875, 1876, and 1877, after making due allowances for all delinquencies, insolvencies, and defaults, when in fact and in law the property of one citizen cannot be taxed for the delinquency of any other citizen, and furthermore the decree in relator's favor is only $292,133.47, and the sum commanded by the writ to be raised is $375,000, or an excess of $83,133,47.

Third. By a mandate of the court, issued the —— day of June, 1873, the general council of the city of Memphis levied a tax of 7 mills per cent. for the year 1873, and a tax of three mills per cent. for the year 1874 in favor of relator, and there is an uncollected balance on said levies of $170,000—all of which is on account of the relator's decree or claim now sought to be enforced, and which is being collected and paid over to him as fast as possible. There has been collected and paid over to him from said levies about $132,742$\frac{69}{100}$—all on account of his said claim; and if respondents are required now to relevy the same burdensome tax on those who have paid, it will be doing a great injury to the prompt taxpayer, and will operate as an inducement to taxpayers to resist the payment of the tax.

Fourth. By the provisions of the law governing the city of Memphis there are certain wards, to wit, the 9th and 10th wards, generally denominated as the new limits, which are exempt-

ed from the payment of any tax to pay for certain indebtedness of the city, and the writ does not show whether the indebtedness is one of the excepted classes or not, and the determination of this question is a judicial one which respondents cannot safely decide for themselves, and should be determined upon the face of the writ. Wherefore the respondents say they have not obeyed the writ, and they pass judgment whether they can do so upon the facts above stated.

G. A. HANSON, *City Att'y.*

Fifth. When the contract was made for the laying of said pavements by which the aforesaid debt became due to the relator,
23 it was understood and stipulated that the owners of the abutting property should pay for the pavement in front of each lot. And many persons paid for such pavement according to the terms of the contract, and when the act recited in relator's petition of Mch. 18th, 1873, was passed it provided that such persons as had paid for the pavement and held receipts therefor might be excused or released from paying the tax levied to pay for such pavement. Wherefore respondents say they cannot levy and collect from all persons subject to pay taxes, the tax as commanded by the writ, and therefore they cannot obey the writ.

Wherefore they pray judgment, &c.

G. A. HANSON,
City Attorney.

Jno. Loague, mayor, makes oath that the foregoing return is true to the best of his knowledge and belief.

JNO. LOAGUE, *Mayor.*

24 Subscribed and sworn to before me, this 26th day of March, 1875.

JAMES REILEY, *Clerk.*
By C. REILEY, *Deputy.*

Filed March 26th, 1875.

H. E. ANDREWS, *Clerk.*

Demurrer.

In the Circuit Court of the United States, District of West Tennessee.

THE UNITED STATES, ON THE RELATION OF T. E. BROWN,
vs.
THE CITY OF MEMPHIS AND OTHERS.

The petitioner demurs to the return herein filed, because—

1st. It presents no sufficient ground for the refusal by the defendants to do what the alternative writ of mandamus required them to do.

2. The act of the 18th of March, 1873, gave full power to levy the tax to pay the plaintiff's decree, and the legislature, if it has attempted to do so, had no power to repeal the act so as to
25 defeat the plaintiff's right to require the levy of the tax.

3d. The court cannot, in ordering a levy of taxes to pay the decree, consider past levies which have not been collected, and may never be.

4th. As a matter of fact the debt due the plaintiff has accrued since the act of 1867; at any rate the defendants do not show that it accrued before, and the constitution and the law require all taxes to be equal and uniform, and that no one species of property shall be taxed higher or lower than other property of equal value, and prevent the exemption of any property from taxation, and the act of March, 1873, makes no discrimination in favor of any person or class of persons.

5th. The constitution and the law require that taxes be levied upon the princip*als* stated in the last paragraph, and hence no account can be taken of the fact that some of those upon whom
26 special assessments were laid to pay for the costs of the pavements laid down, paid the assessments levied upon them. The said special assessments were paid voluntarily and without lawful authority, and constitute no defence to a lawful levy of taxes to pay the said decree. If the parties who have so paid have any equities they are against the city, under the said act of March, 1873, and they are not against the petitioner.

T. E. BROWN, *in person.*

27 United States Circuit Court, Western District of Tennessee.

Proceedings had in the Circuit Court of the United States for the sixth judicial circuit thereof, western district of Tennessee, at a regular term of said court, begun and held for its November term, A. D. 1874, at the federal court-rooms in the city of Memphis, on, to wit, the 30th day of March, 1875, and days subsequent thereto, in the following cause:

UNITED STATES, EX REL. TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS.

The city of Memphis, John Loague, mayor, S. B. Robbins, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, J. Happeck, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, constituting the board of aldermen, and John Zent, P. J. Kelly, Herman Caro, Wm. Hewett, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luehrman, Joseph Clouston, jr., Richard Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moore, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moore, and T. A. Ryan, constituting the common council of the city of Mem-

ed from the payment of any tax to pay for certain indebtedness of the city, and the writ does not show whether the indebtedness is one of the excepted classes or not, and the determination of this question is a judicial one which respondents cannot safely decide for themselves, and should be determined upon the face of the writ. Wherefore the respondents say they have not obeyed the writ, and they pass judgment whether they can do so upon the facts above stated.

G. A. HANSON, *City Att'y.*

Fifth. When the contract was made for the laying of said pavements by which the aforesaid debt became due to the relator,
23 it was understood and stipulated that the owners of the abutting property should pay for the pavement in front of each lot. And many persons paid for such pavement according to the terms of the contract, and when the act recited in relator's petition of Mch. 18th, 1873, was passed it provided that such persons as had paid for the pavement and held receipts therefor might be excused or released from paying the tax levied to pay for such pavement. Wherefore respondents say they cannot levy and collect from all persons subject to pay taxes the tax as commanded by the writ, and therefore they cannot obey the writ.

Wherefore they pray judgment, &c.

G. A. HANSON,
City Attorney.

Jno. Loague, mayor, makes oath that the foregoing return is true to the best of his knowledge and belief.

JNO. LOAGUE, *Mayor.*

24 Subscribed and sworn to before me, this 26th day of March, 1875.

JAMES REILEY, *Clerk.*
By C. REILEY, *Deputy.*

Filed March 26th, 1875.

H. E. ANDREWS, *Clerk.*

Demurrer.

In the Circuit Court of the United States, District of West Tennessee.

THE UNITED STATES, ON THE RELATION OF T. E. BROWN,
vs.
THE CITY OF MEMPHIS AND OTHERS.

The petitioner demurs to the return herein filed, because—

1st. It presents no sufficient ground for the refusal by the defendants to do what the alternative writ of mandamus required them to do.

2. The act of the 18th of March, 1873, gave full power to levy the tax to pay the plaintiff's decree, and the legislature, if it has attempted to do so, had no power to repeal the act so as to
25 defeat the plaintiff's right to require the levy of the tax.

3d. The court cannot, in ordering a levy of taxes to pay the decree, consider past levies which have not been collected, and may never be.

4th. As a matter of fact the debt due the plaintiff has accrued since the act of 1867; at any rate the defendants do not show that it accrued before, and the constitution and the law require all taxes to be equal and uniform, and that no one species of property shall be taxed higher or lower than other property of equal value, and prevent the exemption of any property from taxation, and the act of March, 1873, makes no discrimination in favor of any person or class of persons.

5th. The constitution and the law require that taxes be levied upon the principals stated in the last paragraph, and hence no account can be taken of the fact that some of those upon whom
26 special assessments were laid to pay for the costs of the pavements laid down, paid the assessments levied upon them. The said special assessments were paid voluntarily and without lawful authority, and constitute no defence to a lawful levy of taxes to pay the said decree. If the parties who have so paid have any equities they are against the city, under the said act of March, 1873, and they are not against the petitioner.

T. E. BROWN, *in person.*

27 United States Circuit Court, Western District of Tennessee.

Proceedings had in the Circuit Court of the United States for the sixth judicial circuit thereof, western district of Tennessee, at a regular term of said court, begun and held for its November term, A. D. 1874, at the federal court-rooms in the city of Memphis, on, to wit, the 30th day of March, 1875, and days subsequent thereto, in the following cause:

UNITED STATES, EX REL. TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS.

The city of Memphis, John Loague, mayor, S. B. Robbins, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, J. Happeck, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, constituting the board of aldermen, and John Zent, P. J. Kelly, Herman Caro, Wm. Hewett, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luehrman, Joseph Clouston, jr., Richard Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moore, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moore, and T. A. Ryan, constituting the common council of the city of Mem-

28 phis, and together comprising the general council of said city. This cause was this day heard upon the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued, and it appearing to the court that the said return presents no good cause for not complying with the requirements of the said alternative writ and that the said demurrer is well taken, it is ordered that the same be sustained; and the said defendants saying nothing more in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the court that on the 16th day of March, 1875, the said Talmadge E. Brown recovered on the equity side of the court hereof the city of Memphis the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47) and the costs of the suit, and that an execution has been issued on the said decree and has been returned with the return of the marshal thereon
29 endorsed, to the effect that the city of Memphis has no property whereon to levy and that the execution is returned wholly unsatisfied; and it further appearing that the said city has no money with which to pay the said decree and no property out of which it can be made, and no means of paying the said decree except by levying a tax especially for that purpose, and that it possesses the power to levy and collect such a tax, and that, though often requested so to do, the city has wholly failed to pay the said decree or to levy or to collect a tax for the purpose of paying the same, it is therefore considered, ordered, and adjudged that the alternative writ of mandamus be made peremptory and final, and that the city of Memphis and its general council proceed each year for the ensuing (3) three years, to wit, 1875, 1876, and 1877, respectively, at the same time and in the same manner that other city taxes are assessed and levied and collected, to assess, levy, and collect
30 upon all the property within the city taxable by law a tax, in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after allowing for all delinquencies, insolvencies, and defaults, to realize one hundred and twenty-five thousand dollars each year for the years 1875, 1876, respectively, and so much of the said sum for the remaining year, 1877, as may be required or necessary to pay and satisfy the value of the said decree, including costs and interest not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as and from time to time as the same may be collected to the said Talmadge E. Brown, or into court here, to be forthwith paid him, without the further order of the court, until the whole amount of the said decree, including the cost of the suit and the interest that has accrued thereon, be paid and discharged. It is further ordered that the clerk of
31 this court, whenever the said Talmadge E. Brown shall request the same, issue each year during the said years 1875, 1876, 1877, respectively, a peremptory writ of mandamus, in accord-

ance with the foregoing judgment, to be served on the city of Memphis and its mayor and general council, in the manner prescribed by law; and it is ordered that the plaintiff recover of the defendant, the city of Memphis, the costs herein expended, and that execution issue therefor.

32 *Mandamus.*

UNITED STATES OF AMERICA,
DISTRICT OF WEST TENN.

The President of the United States to the city of Memphis, John Loague, mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, S. Happeck, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, & S. B. Robbins, constituting the board of aldermen, & P. J. Kelly, Herman Caro, Wm. Hewett, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, jr., Richard Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moore, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan, & John Zent, constituting the common council of the city of Memphis, & together constituting the general council of the said city, greeting:

Whereas, it appears that, on the 30th day of March, A. D. 1875, in this the circuit court of the United States for said district of
33 West Tennessee, the cause of T. E. Brown *vs.* the City of Memphis came on to be heard on the demurrer of the plaintiff to the return of the defendant to the alternative writ of mandamus herein issued; and it appearing to the court that the said return presented no good cause for not complying with the requirement of the said alternative writ, and that the said demurrer is well taken, it was ordered that the demurrer be sustained, & the said defendants saying nothing further in bar or preclusion of the remedy sought by the plaintiff, & it appearing to the court that on the 16th day of March, A. D. 1875, the said Talmadge E. Brown recovered on the equity side of this court here of the city of Memphis the sum of two hundred & ninety-two thousand one hundred & thirty-five $\frac{47}{100}$ dollars & the costs of this suit; and that an execution has been issued on the said decree and has been returned with a return of the marshal endorsed thereon, to the effect
34 that the city of Memphis has no property whereon to levy & that the execution is returned wholly unsatisfied, & it further appearing that the said city has no money wherewith to pay the said decree & no property out of which it can be made and no means & paying the said decree except by levying a tax specially for that purpose, & that it possesses the power to levy & collect such a tax, and that, though often requested so to do, the city of Memphis has wholly failed to pay said decree or to levy or collect a tax for the purpose of paying the same. It was, therefore, considered, ordered, and adjudged that the alternative writ of mandamusbe made peremptory & final, & that the city of Memphis and its general

council proceed each year for the ensuing three years, to wit, 1875, 1876, 1877, respectively, at the same time & in the same manner as the other city taxes are assessed, levied, & collected, to assess, levy, & collect from all the property within the city, taxable by law, a tax in addition to all other taxes allowed by law, pay-
35 able in lawful money of the United States of America, sufficient in amount, after making due allowances for all delinquencies, insolvencies, & defaults, &c., to realize one hundred & twenty-five thousand dollars ($125,000) each year for the years 1875, 1876, respectively, and as much of said sum for the remaining year, to wit, 1877, as may be required or necessary to pay & satisfy the balance of the said decree, including interest & cost, not satisfied by the taxes collected & paid over during the two preceeding years; and to pay over the same as fast as & from time to time as the same may be collected, directly to the said Talmadge E. Brown, or into court here, to be forthwith paid him without further order of the court, until the whole amount of the said decree, including the costs of the suit & the interest that has accrued or may accrue thereon, be paid and discharged. Now, therefore, this is to command you, the said city of Memphis, & you, the said mayor,
36 & you, the said members of the board of aldermen & common council, that, in accordance with the said decree you proceed to assess, levy, & collect a tax upon all the taxable property of the city of Memphis, in addition to all other taxes allowed by law, sufficient in amount, after making due allowance for delinquencies, insolvencies, & defaults, to realize $125,000 (one hundred and twenty-five thousand dollars,) & pay over the same in accordance with the above-recited decree of this court, & that you make due return of this writ on the 4th Monday of November next.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, this 28th day of June, A. D. 1875.

[L. S.] H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

Return.—Came to hand June the 29th, 1875, executed by
37 reading the original in the presence of the members of the common council, and also in the presence of the members of the board of aldermen, which assembled by the general council, and by having the original, of which this is a true copy, with the Hon. John Loague, mayor, &c., on the 29th day of June, 1875.

L. B. EATON.
F. H. TORBITT, *Deputy.*

(Endorsed:) Returned and filed Sept. 30th, 1875.
H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

38 *Assignment of Errors.*

THE CITY OF MEMPHIS, JOHN LOAGUE, MAYOR, AND OTHERS, Plaintiffs in error,
vs.
THE UNITED STATES, EX REL. TALMADGE E. BROWN, Defendant in error.

Supreme Court of the United States.

Plaintiffs in error assign the following as grounds for the reversal of the judgment below:

1. There was error in holding that the city of Memphis had the power, or was under the duty of levying the tax, as therein adjudged.

2. There was error in holding that the legislature of the State of Tennessee had no power to repeal the act of March 18th, 1873, set out in the relator's petition.

3. There was error in adjudging that the tax to be levied should be payable only in lawful money of the United States. The act of March 18th, 1873, requiring the city of Memphis to receive,
39 in payment of the tax therein authorized, "any sum or sums, with interest, paid by persons in satisfaction or part satisfaction of said special assessments, illegally levied and collected as aforesaid."

4. There was error in holding that a new and further tax be laid, sufficient to pay the entire decree, for $292,133.47, the return to the alternative writ disclosing that under a former mandate of the court the city of Memphis had made a special levy of $302,742.69, for the purpose of paying relator's decree; that of said levy $132,742.69 had been collected and paid over to relator, Brown, and the remainder, $170,000, was being collected and paid over as rapidly as possible.

5. There was error in awarding the writ of mandamus commanding the levy of a tax sufficient in amount, after making due allowances for all *delinquencies*, insolvencies, and *defaults*, to pay relator's decree.

6. Upon the entire record it was error to award the peremptory writ of mandamus.

S. P. WALKER,
Atty. for Plaintiffs in Error.

40 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the judges of the Circuit Court of the United States for the Western District of Tennessee, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the circuit court, before you, between the United States, ex rel. Talmadge E. Brown, vs. The City of Memphis, John Loague, mayor, S. B. Robins, Owen Dwyer,

C. W. Metcalf, Nick Malatesta, H. G. Dent, J. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, and G. A. Morti, constituting the board of aldermen, and John Zent, P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, jr., Richard Dougherty, Wm. Gay, Chas. G.
41 Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochrane, J. D. Danbury, L. D. Grant, Jacob Moon, and T. A. Ryan, constituting the common council of the said city of Memphis, and together composing the general council of said city, a manifest error hath happened, to the great damage of the said city of Memphis, and the other defendants above named, as by their complaint appears. We being willing that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2d Monday of October next, in the said
42 Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, and the seal of said circuit court, the 16 day of December, 1876.

[SEAL.] HORACE E. ANDREWS,
Clerk of the Circuit Court for the Western District Tennessee.

43 UNITED STATES OF AMERICA.

To Talmadge E. Brown, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Circuit and District of West Tennessee, wherein the city of Memphis, John Loague, J. R. Robbins, Owen Dwyer, C. W. Metcalf, Nich Malatesta, H. G. Dent, J. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, John Zent, P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, jr., Rich'd Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, and T. A. Ryan, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error men-
43½ tioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Connally F. Trigg, Judge of the District Court of the United States for the District of West Tennessee, and now holding the November term 1876, of the circuit court thereof, this 19th day of December, 1876.

CONNALLY F. TRIGG,
District Judge, &c.

Service of the foregoing citation acknowledged, this 18th day of December, 1876.

T. E. BROWN.

The foregoing acknowledgment of service was made by T. E. Brown, in person, and in my presence.

44 Supreme Court of the United States.

THE CITY OF MEMPHIS, JOHN LOAGUE, MAYOR, J. R. ROBBINS, Owen Dwyer, C. W. Metcalf, Nich Malatesta, H. G. Dent, J. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, and G. A. Morti, constituting the Board of Aldermen, and John Zent, P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, jr., Richard Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, and T. A. Ryan, constituting the Common Council of the said City of Memphis, and together composing the General Council of said city, Plaintiffs in Error,

vs.

THE UNITED STATES, EX REL. TALMADGE E. BROWN, Defendant in Error.

Know all men by these presents, that we, the city of Mem-
45 phis, and John Loague and others hereinabove named as the plaintiffs in error, as principals, and John R. Flippin, as surety, are held and firmly bound unto the above-named Talmadge E. Brown in the sum of five hundred dollars, to be paid to the said T. E. Brown, his executors or administrators: to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of December, 1876.

Whereas the above-named city of Memphis, and John Loague and others hereinabove named as the plaintiffs in error, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the Circuit and District of West Tennessee:

Now, therefore, the condition of this oblgation is such that if the above-named city of Memphis and John Loague et al., herein

46 above named as plaintiffs in error, shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

THE CITY OF MEMPHIS,
JOHN LOAGUE, *Mayor,*
and others above named, as Plaintiffs in Error,
By S. P. WALKER, *their Att'y.*
J. R. FLIPPIN, *Surety.*

The foregoing bond is approved.

CONNALLY F. TRIGG,
U. S. District Judge, &c.

47 THE UNITED STATES OF AMERICA,
SIXTH CIRCUIT AND DISTRICT OF WEST TENNESSEE.

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the pet. for alt. writ of mandamus, order for do., alt. writ of mandamus, answer of city to alt. writ, demurrer of pl'ff, order sustaining dem'r, per. writ, assignment of errors, writ of error, citation in said court, bond and certificate, as the same now appear of record and upon the files in my office, in the following cause, to wit:

THE UNITED STATES, EX REL. T. E. BROWN,
vs.
CITY OF MEMPHIS.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 14th day of March, A. D. 1877, and of the independence of the United States the 101st year.

[SEAL.] HORACE E. ANDREWS, *Clerk.*

(Endorsement on cover:) W. Tennessee C. C. U. S. No. 941.. The City of Memphis et al., pl'ffs in error, vs. The United States, ex rel. Talmadge E. Brown. Filed 22 October, 1877.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

CITY OF MEMPHIS ET AL., PLFFS. IN ERROR,
vs.
U. S., EX REL. T. E. BROWN.
} No. 941.

Error to Circuit Court U. S. for the Western District of Tennessee.

It is hereby stipulated and agreed by counsel for the respective parties that the clerk of the circuit court in sending up the record in the above-entitled cause has made certain errors in copying, and it is further stipulated and agreed that the following corrections be therefore made, viz:

On page 8, p. p. 3: "$25,000" should read "$125,000."
On page 13, p. p. 5: "appertaining" should read "apportioning."
On page 33, p. p. 11: "thirty-five" should read "thirty-three."
On page 34, p. p. 11: "&" should read "of."

S. P. WALKER,
Of Counsel for Plaintiffs in Error.

FILLMORE BEALL,
Of Counsel for Defendant in Error.

46 above named as plaintiffs in error, shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

THE CITY OF MEMPHIS,
JOHN LOAGUE, *Mayor,*
and others above named, as Plaintiffs in Error,
By S. P. WALKER, *their Att'y.*
J. R. FLIPPIN, *Surety.*

The foregoing bond is approved.

CONNALLY F. TRIGG,
U. S. District Judge, &c.

47 THE UNITED STATES OF AMERICA,
SIXTH CIRCUIT AND DISTRICT OF WEST TENNESSEE.

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the pet. for alt. writ of mandamus, order for do., alt. writ of mandamus, answer of city to alt. writ, demurrer of pl'ff, order sustaining dem'r, per. writ, assignment of errors, writ of error, citation in said court, bond and certificate, as the same now appear of record and upon the files in my office, in the following cause, to wit:

THE UNITED STATES, EX REL. T. E. BROWN,
vs.
CITY OF MEMPHIS.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 14th day of March, A. D. 1877, and of the independence of the United States the 101st year.

[SEAL.] HORACE E. ANDREWS, *Clerk.*

(Endorsement on cover:) W. Tennessee C. C. U. S. No. 941.. The City of Memphis et al., pl'ffs in error, vs. The United States, ex rel. Talmadge E. Brown. Filed 22 October, 1877.

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U. S., EX REL. T. E. BROWN.
No. 941.

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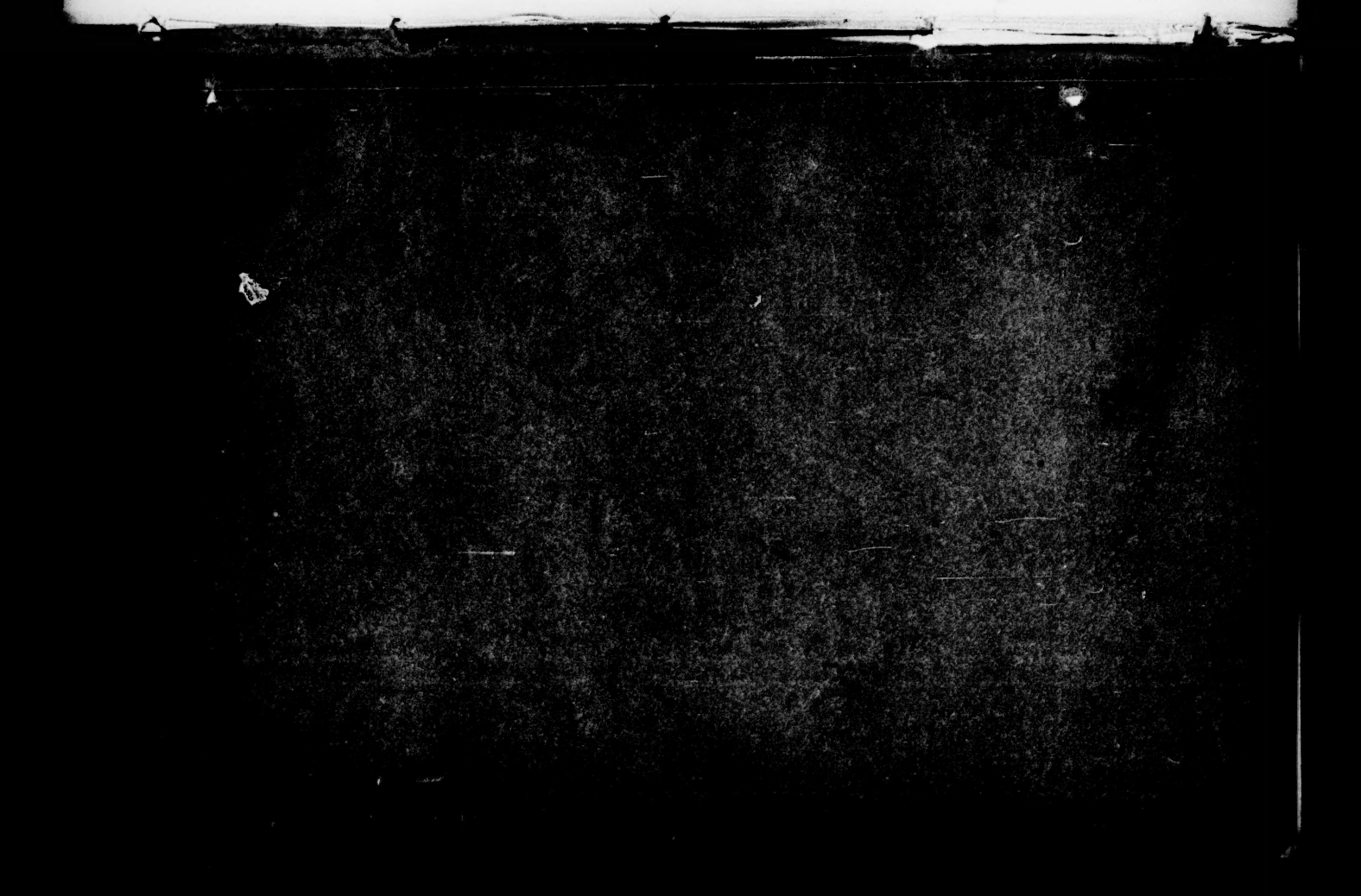
S. P. WALKER,
Of Counsel for Plaintiffs in Error.

FILLMORE BEALL,
Of Counsel for Defendant in Error.



No. 941.

Supreme Court of the United States.

CITY OF MEMPHIS ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, EX REL., T. E. BROWN,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

S. P. WALKER,
HUMES & POSTON,
Of Counsel.

Assigment of Errors.

THE CITY OF MEMPHIS, JOHN LOAGUE, MAYOR, AND OTHERS, Plaintiffs in Error,
vs.
THE UNITED STATES, EX REL. TALMADGE E. BROWN, Defendant in Error.

Supreme Court of the United States.

Plaintiffs in error assign the following as grounds for the reversal of the judgment below:

1. There was error in holding that the city of Memphis had the power, or was under the duty of levying the tax, as therein adjudged.

2. There was error in holding that the legislature of the State of Tennessee had no power to repeal the act of March 18th, 1873, set out in the relator's petition.

3. There was error in adjudging that the tax to be levied should be payable only in lawful money of the United States. The act of March 18th, 1873, requiring the city of Memphis to receive, in payment of the tax therein authorized, "any sum or sums, with interest, paid by persons in satisfaction or part satisfaction of said special assessments, illegally levied and collected as aforesaid."

4. There was error in holding that a new and further tax be laid, sufficient to pay the entire decree, for $292,133.47, the return to the alternative writ disclosing that under a former mandate of the court the city of Memphis had made a special levy of $302,742.69, for the purpose of paying relator's decree: that of said levy $132,742.69 had been collected and paid over to relator, Brown, and the remainder, $170,000, was being collected and paid over as rapidly as possible.

5. There was error in awarding the writ of mandamus commanding the levy of a tax sufficient in amount, after making due allowances for all *delinquencies*, insolvencies, and *defaults*, to pay relator's decree.

6. Upon the entire record it was error to award the peremptory writ of mandamus.

Wherefore plaintiffs in error pray that the said judgment may be reviewed and reversed.

S. P. WALKER,
HUMES & POSTON,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

No. 941.

THE CITY OF MEMPHIS ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES, EX REL., T. E. BROWN,
DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR.

On the 15th day of March, 1875, a decree was rendered in the Circuit Court of the United States for West Tennessee in favor of T. E. Brown against the city of Memphis, for $292,133.47. On the 22d day of March, 1875, Brown filed in the same court a petition for the writ of *mandamus* to compel the city to levy a tax to pay his decree. The alternative writ issued; the city made return thereto; Brown demurred to the return; the demurrer was sustained, and final judgment rendered, awarding the peremptory writ of *mandamus*, by which the city was commanded "to assesss, levy, and collect, upon all the property within the city, taxable by law, a tax *in addition to all other taxes allowed by law*, payable in the lawful money of the United States of America, sufficient in amount, after allowing for all delinquencies, insolvencies, and defaults," to pay said decree.

The judgment awarding the writ of *mandamus* is brought

up for review under a writ of error, sued out by the city of Memphis and its General Council.

The chief question to be discussed is, whether the Legislature had conferred upon the city such taxing power as authorized the writ of *mandamus* in the terms in which it was awarded.

Brown's claim against the city was based upon certain contracts for paving the streets of the city with the Nicholson pavement, made in the year 1867, with Taylor, McBean & Co., and Forrest, Mitchell & Co., and, with the consent of the city, assigned, in the year 1868, to T. E. Brown.

Under the provisions of an act of the Legislature, the city undertook to charge the cost of the pavement to the owners of the abutting property, proportioning the same according to the frontage of each lot upon the street.

Many property owners resisted payment of the assessments; and, upon a test case, it was held by the Supreme Court of the State that they were illegal and void, and could not be enforced.

Brown then brought suit against the city, and finally recovered the aforesaid judgment for $292,133.47.

In order to show that the city had such taxing power as would authorize a writ of *mandamus*, commanding the levy of a special tax, in addition to all other taxes, sufficient to pay his judgment, Brown, in his petition, alleges that "in addition to the city's other powers of taxation," the Legislature of the State on the 18th of March, 1873, passed an act entitled "An act to amend the charter of all the incorporated towns and cities in the State," by the first section of which it was enacted as follows:

"*Be it enacted by the General Assembly of the State of Tennessee*, That where any incorporated town or city has by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which levy and assessments was afterwards declared void by the Supreme Court of the State, said town or city shall have the power to levy a tax, in addition to all other taxes allowed by law to be levied, suffi-

cient to cover the entire costs of the improvements, with interest thereon, for which said special assessments were illegally made," etc., etc.

Brown's case was clearly within this act, and the terms of the act clearly sufficient to authorize the levy of the tax as prayed for by him.

But the city by its return showed that the aforesaid act was repealed.

It was repealed in express terms by chap. XCII, sec. 81, of the acts of 1875, page 167.

In the argument now made for the defendant in error, it is contended that an unlimited taxing power is conferred by the act of January 16, 1871. Conceding, for the present, (though we shall presently argue the contrary,) that this act applied to the city of Memphis, we answer that it also was repealed by the 81st section of the act of March 20, 1875.

The two acts relied on as conferring the taxing power, to wit, the acts of March 18, 1873, and that of January 16, 1871, and the 63d, 64th and 81st sections of the act of March 20, 1875, relied upon by us as repealing them, are as follows:

CHAPTER LXVII.

AN ACT to amend the Charter of all the incorporated Towns and Cities in the State.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That where any incorporated town or city has, by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes, or special assessments, the right to make which levy and assessment was afterwards declared void by the Supreme Court of the State, said town or city shall have the power to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made, and in the levying of such additional tax, authority is hereby given to such town or city, to allow as valid payments on said additional tax, any sum or sums, with interest, paid by persons in satisfaction, or in part satisfaction, of said special assessments, illegally levied and collected as aforesaid.

SEC. 2. *Be it further enacted*, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 18, 1873.

W. S. MCGAUGHEY,
Speaker of the House of Representatives.
A. T. LACEY,
Speaker of the Senate.

Approved March 24, 1873.

JOHN C. BROWN,
Governor.

The act of January 16th, 1871, is entitled "An act to enforce article II, section 29, of the Constitution to authorize the several counties and incorporated towns of this State to impose taxes for county and corporation purposes," and enacts that "the several counties and incorporated towns in this state may, and are hereby authorized to impose taxes for county and corporation purposes respectively."

The 63d, 64th, and 81st sections of this act of March 20, 1875, repealing the above two statutes in so far as the city of Memphis is concerned, are as follows:

"SEC. 63. No such municipality shall assess, levy or collect a greater rate of taxes than one dollar and sixty cents on each one hundred dollars' worth of taxable property in such city."

"SEC. 64. It shall be the duty of the General Council, immediately after the assessment of the property of the city for taxation, to make out what is known in legislative parlance (as) a budget, and apportion the one dollar and sixty cents to defray the various items of expense incident to carrying on the city government: *Provided*, that not more than one dollar, or one per cent., shall be appropriated to defraying general expenses, such as police and fire departments, officers' salaries, water and lights, improving or repairing streets, etc., and not more than sixty cents shall be appropriated to special purposes; of this amount twenty cents shall be appropriated to the payment of interest on the bonded debt; twenty-five cents shall be appropriated to providing a sinking fund, to retire the bonded indebtedness; ten cents shall be appropriated to the maintenance of the city schools, and five cents shall be appropriated to the payment of judgments."

"SEC. 81. That all laws and parts of laws in conflict with

this Act, as also Chapter XXVI of the private acts of 1869 and 1870, entitled 'An act to reduce the charter of the city of Memphis, and the several acts amendatory thereof into one act, and to revise the same,' passed December 1, 1869; also Chapter LXVII of the public acts of 1873, entitled 'An act to amend the charter of all incorporated towns and cities in the State,' passed March 18, 1873, and also Section 81 of Chapter CXVIII of the Acts of 1873, entitled 'An act to provide more just and equitable laws for the assessment and collection of revenue for State and county purposes,' be and the same are hereby repealed."

It will be at once perceived that by the above-quoted 81st section the act of March 18, 1873, is referred to by its title, and repealed; that "all laws and parts of laws in conflict with this act" are repealed; and that the acts of March 18, 1873, and January 16, 1871, are clearly in conflict with the 63d and 64th sections, above-quoted, and are consequently repealed.

It is submitted, also, that the act of January 16, 1871, being a general act, cannot be held to remove the restrictions upon the taxing power of the city of Memphis, imposed by the long line of special legislative acts, hereinafter referred to.

But it is argued for the defendant in error, that as to him the Legislature had no power to repeal these statutes.

We are at a loss to conceive upon what ground it is possible to put the argument.

The original paving contracts were made in 1867, assigned to Brown in 1868, and the work under them completely performed before the year 1872; for, in March, 1872, Brown procured judgment against the city in his suit upon the contracts. The act conferring the taxing power was a pure gratuity, not part of, and not in existence at the time of the making or performance of the contract. That a taxing power thus conferred as a favor to the creditor may be recalled at the will of the sovereign, can only be denied upon the theory hitherto unheard of, that it relates to, and by relation incorporates itself into the original contract; or, upon some novel notion that the Legislature will not be allowed

to interfere with a remedy, created by itself, and out of its own good favor, though entirely subsequent to, and no part of, the contract. It required argument, and strong argument, to carry the proposition that the Legislature could not interfere with the taxing power as it existed at the time of the contract. We believe that no one has heretofore ventured to push the doctrine so far as to assert that it could not interfere with, or recall a taxing power conferred years after the contract, and upon which it is impossible to suppose that the creditor relied in extending credit to, or accepting the obligations of the city.

In Von Hoffman *v.* Quincey, 4 Wall., 535, this court said:

"It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. * * * * * * Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void. * * * *

* * * * * * * When the bonds in question were issued there were laws in force which authorized the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time upon the entire debt. But for the act of 14th February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by the act will be insufficient; and it is not certain that anything will be yielded, applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. * * * * * * The laws requiring taxes to the requisite amount to be collected, *in force when the bonds were issued*, are still in force for all the purposes of this case.

The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if the act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion."

In the case of the City of Memphis *v.* Bethell, the same act that authorized the issue of the bonds conferred the tax-

ing power necessary to pay them; and the court merely followed the Von Hoffman case, holding that the taxing power, conferred at the time the bonds were issued, could not be afterwards taken away. The principle of these decisions we are willing and anxious to apply to the case in hand. We shall presently show that *at the time the contracts were made with, and performed by Brown, the taxing power of the city was limited to one per cent.*, and submit that he cannot complain so long as it is not brought below that figure.

Let us examine the grounds upon which the power to repeal is denied.

It is said for defendant in error that Brown had acquired a vested right in the provisions of the act of 1873 above quoted; and that the constitution of Tennessee, article 1, section 20, provides: the legislature shall enact no retro spective law, or law impairing the obligation of a contract. And, say they, the act of 1875, in attempting to repeal the act of 1873, was retrospective, and sought to divest a vested right of Brown to have his judgment satisfied by the levy and collection of taxes under the act of 1873.

To this objection to the repealing effect of the act of 1875 we reply, *that* article 1, section 20, of the constitution of Tennessee of 1870, is identical with a like provision in the constitution of Tennessee of 1796, and of 1834, that our courts, for a period of eighty years, have construed that provision to mean: "The legislature shall not pass any retrospective law, or other law impairing the obligation of a contract;" thus limiting the restriction to the passage of laws impairing the obligation of contracts. The leading case on this subject, and the case approving it, are:

Townsend *v.* Townsend, 1 Peck. R., (Cooper's ed.,) p. 1.
Webster & Mason *v.* Rose, 6 Heisk., R. 93.
Bell *v.* Perkins, 1 Peck, 266.
Jones *v.* Jones, 2 Tenn. R., 2.
Wynne *v.* Wynne, 2 Swan., 410.
Smith *v.* Brady, 7 Yer. R., 451.
Greenfield *v.* Dorris, 1 Sneed R., 550.

Again, the act of 1873 was a general revenue law applicable to all the cities in the State, extending their powers of taxation, but wholly without connection with any contracts. Its enactment was an exercise of the sovereign power of taxation, through the local civil Governments of the State. It was, so far as it benefitted Brown and others, similarly situated, a mere gratuity. Therefore, it could be repealed at the pleasure of the Legislature.

This court, in 22 Wallace R., 575, lays down the rule as follows: "The taxing power is vital to the functions of Government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interest of every member of the community. It may be restrained by contract, in special cases for the public good, where such contracts are forbidden. But the contract must be shown to exist; there is no presumption in its favor. Every reasonable doubt should be resolved against it; where it exists it is to be rigidly scrutinized, and never permitted to extend either in scope or duration beyond what the terms of the conversion clearly require. It is in derogation of public right, and narrows a trust created for the good of all."

In 3 Otto R., 597, West Wiscon. R. R. Co. *v.* Supervisors, Justice Swayne again delivering the opinion of this court, it was again held, that exemptions from taxation granted for a limited time, on condition of the railroad company's mortgaging its land and completing the road in two years, "was a mere gratuity offered by the State, without any element of contract, and the State might continue or withdraw that gratuity, when it took effect, as it might deem best for the public welfare."

The principle of these cases seems conclusive to us of the one under consideration. The authority under the act of 1873 was that of a general revenue act, confessedly without connection with a contract as an inducement to, or consideration thereof, and, in the language of his Honor, Justice Swayne, a mere gratuity from the State, which it could

withdraw at pleasure. It is idle, therefore, to call Brown's rights under the act of 1873 a vested right.

In 13 Howard R., p. 440, 19 Curtis R., 577, Norris *v.* Crocker, this court held: "The suit was pending below when the repealing act of September 18, 1850, was passed, and was, for the penalty of five hundred dollars, secured by the 4th section of the act of 1793. As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter. And, in the next place, as the plaintiff had *no vested right in the penalty*, the Legislature might discharge the defendant by repealing the law."

See, also, 5 Wallace R., 541, Insurance Co. *v.* Ritchie.

Now, it is equally clear that the institution of his proceedings on March 22, 1875, in the Circuit Court of the United States for a *mandamus* against the city, to compel the city to levy the tax under the act of 1873, did not, because begun the day before the Governor approved the repealing act of 1875, have the effect to clothe Brown with a vested right to the enforcement of the act of 1873, and deprive the State of its power to withdraw its mere gratuity.

The decisions of the Supreme Court of Tennessee, by an unbroken chain from the creation of the State in 1796, to the present time, have held, in the language of Judge Sneed, delivering the opinion of the Court in 9 Heiskell (Tenn.), R., 847, Collins *v.* East Tennessee and Virginia Railroad Company, that subject to the inhibition against retrospective laws impairing the obligation of a contract, or divesting vested rights, "the State has complete control over the remedies of its citizens in its courts. Vested rights of action are such as spring from contracts, or from the common law. But the right to a particular remedy is not a vested right. The State has complete control over the remedies of its citizens in the courts. It may give a new and additional remedy for a right already in existence, or may abolish old and substitute new remedies. It may modify any existing remedy. Retrospective laws may be made when

they do not impair the obligation of contracts or divest vested right."

In 6 Heiskell R., 93, Webster *et al. v.* Rose—

"The court declare the Legislature have complete control over the remedy, provided they do not render the remedy essentially less effective for the enforcement of the obligation, than that which pertained to *the original contract.*" This was said in a case where, after a money obligation had been contracted, the Legislature passed an act allowing a stay of execution for eight months after judgment; the court held it was unconstitutional, because it delayed collection longer than was allowed by the laws of the State at the date of making the contract.

The decisions of the Supreme Court of Tennessee have recognized uniformly the power of the State to control absolutely the remedies administered in the courts, with the express limitations following; that the remedy existing at the date of the contract shall not be substituted by one less efficacious, or more tardy; that the new remedy, or abolition of the old remedy, shall not have the effect to impair the obligation of the contract, nor divest a vested right. They have as uniformly adhered to the principle, that a vested right is either a right of property, or a right to a remedy existing at the date of the contract; or such an abolition of the remedy as would absolutely defeat the right by a denial of all remedy.

No case in Tennessee can be found which denies the power of the Legislature, first, to give a more efficacious remedy than that existing at the date of the contract, and afterwards to take away the latter and more efficacious remedy, leaving all the substantial remedies existing at the date of the contract.

We now cite those cases relied on by the opposing counsel, and submit they are within the rules just set forth.

6 Yer. R., 120, Fisher's Negroes *v.* Dabbs, *et al.*

Fisher's negroes had been emancipated by his will, prior to 1829. The only remedy then existing, to assert their

freedom, was a petition by the executor, or administrator, in the County Court under the act of 1801, ch. 27. In 1829 an act was passed, allowing the slaves, in the event the executor would not file a petition, to file a bill in equity to assert their freedom. Fisher's negroes filed a bill in chancery under the act of 1829. Pending this suit, in 1831, the Legislature passed an act, declaring the act of 1829 should not be construed so as to extend to any case existing before the act was passed, but that all such cases should be stricken from the docket by the chancellor. The court declared the act of 1831 unconstitutional. They held the will of Fisher to be a deed of manumission, vesting *the right to their freedom* in the negroes absolutely; that the act of 1829 was their *only remedy;* that the act of 1831 was a judicial mandate from the Legislature, and, therefore, void; that its effect would be to destroy their right, as no adequate remedy existed elsewhere.

In 2 Swan R., 35, Burns *v.* Tucker—

A plaintiff, in an action of forcible and unlawful detainer, died pending the suit. After his death, the Legislature passed an act authorizing the suit to be revived, either in the name of the personal representative or heir. The court held this act unconstitutional and void, saying: "On the death of the plaintiff, the right to possession of his real estate vested in his heirs, while the right to damages for rent and detention accrued before his death vested in his personal representative; and this act would divest rights of property out of one private person and vest them in another, it was, therefore, retrospective and void."

In 1 Heiskell R., 287, Girdner *v.* Stephens—

The court held, that when the existing statute of limitations had formed a complete bar to a right of action for a tort to the person, the right to this defense had become a vested right, and neither the Legislature nor a constitutional convention could revive the right of action so barred. It would be divesting a vested right.

Neither of these three cases give any color to the idea that the taking away a remedy given after the contract was

made is unconstitutional, provided the substantial remedies existing at the date of the contract are left unimpaired. Nor do they give any color to the claim that a party has a vested right in such remedy. In the case of Fisher's negroes, their right to be free rested on a deed of manumission, an executed contract, and the repeal of the act of 1829 would defeat their only remedy, and would thus impair the obligation of the contract and divest their vested right. In the case of Burns *v.* Tucker 2 Swan., 35, the act would have taken property from one person and given it to another, to wit, the right of the heir to realty and of the personal representative to personalty.

In the 1 Heiskell case, page 287, the act would have created a new right in reviving one already discharged and extinguished.

We therefore conclude and insist that as Brown, at the date of his contracts, was only entitled to a one per cent. tax on the one hundred dollars' worth of property, the act of 1875 is not unconstitutional, because it takes away the unlimited right of taxation given by the act of 1873; for it not only leaves the remedy existing at the date of his contract untouched, but it gives an additional remedy of five cents on the one hundred dollars' worth.

But, out of abundant caution, we add the following decisions of other tribunals on the same point:

"The right to a particular remedy is not a vested right. * * * As a general rule, every State has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right already in existence."

Cooley's Constitutional Limitation, 361–381.
Story on Constitution, sec. 1379.
Hope *v.* Johnston, 2 Yerger, 123.
Bacon *v.* Callendar, 6 Mass., 309.
Butler *v.* Palmer, 1 Hill, 324.
Hartung *v.* People, 22 N. Y., 100.
Farnsworth *v.* Reaves, 2 Cald., 116.
Ogden *v.* Saunders, 12 Wheaton, 309.
Hepburn *v.* Curts, 7 Watts, 300.
Collins *v.* E. T. & V. R. R., 9 Heiskell, 841.

In Story on Constitution, sec. 1379, the following general rule is announced: "Although there is a distinction between the obligation of a contract, and a remedy upon it, yet, if there are certain remedies existing at the time when it is made, all of which are afterwards wholly extinguished by new laws, so that there remains no means of enforcing its obligation, and no redress, such an abolition of all remedies, operating *in prevynto*, is also an impairing of the obligation of such contract. But every change and modification of the remedy does not involve such a consequence. No one will doubt that the Legislature may vary the nature and extent of remedies so always that some substantial remedy be, in fact, left.

In Farnsworth *v.* Vance, 2 Cald. R., 117, our Supreme Court, Maynard, Judge, holds: "These authorities seem to us to establish the following propositions:" * * *

"That there is an essential and substantive distinction between the obligation of a contract, and the means which Government may furnish to enforce it. The latter constitutes the remedy.

"That a proposition to pass any law impairing the obligation does not imply a prohibition to vary the remedy."

"That the Legislature may, in their discretion, vary the nature and extent of the remedy, so that always some substantial remedy be, in fact, left."

In Collins *v.* E. T. & Va. R. R., 9 Heiskell, 847, (the latest Tennessee Report.) Sneed, Judge, says: "The State has complete control over the remedies of its citizens in the courts. It may give a new and additional remedy for a right already in existence, or may abolish old and substitute new remedies. It may modify an existing remedy."

In Hepburn *v.* Curts, 7 Watts, 300, the court holds that the Legislature, provided it did not violate the constitutional provision, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not possess, or modify an existing remedy."

The true rule seems to be that while the Legislature has

absolute power over the remedy, and may modify it or substitute another in its stead at pleasure, yet it cannot entirely abrogate it so as to defeat the operation of all remedy, and that so long as a remedy is afforded co-extensive with the remedy in operation when the contract is made, that the parties will not be heard to complain at the change or modification.

The courts have gone to great extremes in distinguishing between this *right* and *remedy*, as applied to contracts—thus: The giving of a lien by statute does not confer a vested right, and it may be taken away by a repeal of the statute.

Watson *v.* N. Y. Central R. R. Co., 47 N. Y. 157.
Woodbury *v.* Grimes, 1 Colorado, 100.

In both of these cases liens were given by the statutes in force when the judgment was recovered and the work done; yet, before their enforcement was perfected the statutes were repealed, and such repealing statutes were held not unconstitutional, being only applicable to the remedy.

A statute, though operating to lessen the time allowed for the exercise of a previously existing statutory right, (of redemption,) is not unconstitutional.

Butler *v.* Palmer, 1 Hill, 325.

Although the law, at the time the contract is made, permits the creditor to take the body of his debtor in execution, there can be no doubt of the right to abolish all laws for this purpose, leaving the creditor to his remedy against property alone.

Cooley's Constitutional Limitations, page 287.

In Sturgis *v.* Crowninshield, 4 Wheaton, 200, Chief Justice Marshall said: "Without impairing the obligation of the contract, the remedy may be certainly modified, as the wisdom of the nation may direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means and leave the contract in full force.

Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation.''

To same effect see—

Mason *v.* Haile, 12 Wheaton, 230.
Woadfin *v.* Hooper, 4 Humphreys, 13.

The Legislature of the State may likewise create exemption laws of real and personal property, wearing apparel, etc., and such regulations have uniformly been held as belonging to the remedy.

Cooley's Constitutional Limitations, 287, and Note 2.
16 Johnston, 244.

It has been held that a homestead exemption may be made without regard to previously existing contracts.

Hardeman *v.* Downer, 39 Ga., 425.
Hill *v.* Kessler, 63 N. C., 437.
Ladd *v.* Adams, 66 N. C., 164.

It is also conceded that when rights, under such remedies, are vested, that they cannot be disturbed by after legislation.

Girdner *v.* Stephens, 1 Heiskell, (Tenn.) 280.

In this case the statute of limitations had barred the remedy for an action for false imprisonment when the Constitution of 1865 was passed, suspending the statute of limitation from a period ante-dating the bar, and the Supreme Court of Tennessee properly held that the bar having become complete anterior to the passage of the constitutional amendment, that the cause of action could not be maintained.

These authorities, and they might be multiplied indefinitely, all hold that the remedy may be as a matter of fact repealed or modified in any respect, so that vested rights are not interfered with, and the statute of limitation, if not fully run, may be extended indefinitely within the discretion of the law-makers.

Another principle is, that the bringing of a suit vests in a party no right to a particular decision, *and his case must*

be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered; and if a case is appealed, and pending the appeal the law is changed, the Appellate Court must dispose of the case under the law in force when its decision is rendered.

Cooley's Constitutional Limitations, 381.

In *ex parte* McCardle, 7 Wallace, 514, this court lays down the following principles:

"On the other hand, the general rule supported by the best elementary writers is, 'that when an act of the Legislature is repealed, *it must be considered*, except as to transactions closed, *as if it had never existed.*' And the effect of repealing acts upon suits under acts repealed has been determined by the adjudications of this court. The subject was fully considered in Norris *v.* Crockett, (13 Howard, 429,) and more recently in Insurance Co. *v.* Ritchie, (5 Wallace, 541.) In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted."

Now let us examine and see how and upon what basis defendant in error seeks to sustain the levy of the tax sufficient to pay his judgment, in addition to the tax of $1.60 already levied.

At date of the making and completion of the paving contracts with him, the only tax allowed by law to be levied by the city of Memphis, was a tax of $1 on the $100 worth of taxable property, and this limit was for all purposes material to Brown's case and in full force up to the passage of the act of March 18, 1873, which gave an unlimited power of taxation for this purpose. All, then, that he could claim under the law above quoted, is that his remedy be not abridged; that is, that the remedy be not cut down below a tax of $1 on the $100 worth of taxable property. Suppose the act of March 18, 1873, had never been passed, would he then insist that he could have levied more than the $1 on the $100 worth of taxable property? Certainly not. Then upon what does

he base his demand for the benefit of the act of March 18, 1873? Certainly not upon the idea that such remedy is a part of his contract, for it was not passed until long after the contracts were made and ended. This act was no part of his remedy; it was a mere gratuity on the part of the Legislature, and was revocable at pleasure.

Again, it is insisted for defendant in error, that section 49 of the code of Tennessee, passed in January, 1858, enacting that the repeal of a statute shall not affect any right accrued, duty imposed or proceeding commenced, under the repealed statute, will save his *mandamus* proceeding.

But we insist, under the laws of the State and the construction thereof by our Supreme Court, that this act of March 18, 1873, was repealed by the act of March 20, 1875, before the petition of defendant in error for *mandamus* was filed, on the 22d day of March, 1875, and consequently was not the law at the date of the commencement of the proceedings. This repealing act, by section 82 thereof, provided: "*Be it further enacted*, That this act shall take effect from and after its passage, the public welfare requiring it.

"Passed March 20, 1875.

"LEWIS BOND,
Speaker of the House of Representatives.
"THOMAS H. PAINE,
Speaker of the Senate.

"Approved March 23, 1875.

"JAMES D. PORTER, *Governor.*

As will be seen, it was passed 20th of March, 1875, and signed by both Speakers, although not approved by the Governor until the 23d of March, 1875. Now article 2, section 18, of the Constitution of 1870, of the State of Tennessee, reads as follows: "Every bill shall be read once on three different days, and be passed each time in the House where it originated, before transmission to the other. No bill shall become a law until it shall have been read and passed on three different days in each house, and shall have received, on its final passage in each House, the assent of a majority of all the members to which that house shall be

entitled under the Constitution, and shall have been signed by the respective Speakers in open session, the fact of such signing to be noted on the journal, and shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of the Constitution."

(This act of 1875 was passed under the foregoing constitution.)

Now, the constitution of 1834, article 2, section 18 reads as follows: "Every bill shall be read once on three different days, and be passed each time in the house where it originated before transmission to the other. No bill shall become a law until it shall be read and passed on three different days in each house and be signed by the respective speakers."

The two provisions are identically the same, except that the governor is to sign and approve the act, under the constitution of 1870.

Now, section 20 of article 2 of the constitution of 1870 provides: "The style of the laws of the State shall be: *Be it enacted by the General Assembly of the State of Tennessee.* No law of a general nature shall take effect until forty days after its passage, *unless the same or its caption shall state that the public welfare requires that it should take effect sooner.*"

This is identically the same provision as in the constitution of 1834.

Our Supreme Court, in construing this 18th section aforesaid, in the only two cases which (after a careful examination) we have been able to find, hold that the effect to be given to the act is from the passage thereof (if to take effect from and after its passage,) *and that, when signed, it immediately took effect by relation from and after its passage.* These decisions, however, were under the same 18th section of article 2 of the Constitution of 1834, which made it a condition precedent to the validity of the law that the speakers sign it, as the present Constitution requires the Governor.

Dyer *v.* State, Meigs' Reports, 237–255.

Turner *v.* Obum, 3 Caldwell, 469.

In Dyer *v.* State, Meigs's Reports, at 255, Turley, Judge, says: "It is said in defense that Dyer, on the morning of the 27th of January, 1838, applied to the clerk of the County Court of Davidson county for a license to retail spirituous liquors, which was refused, although there was then no law prohibiting it. The act of 1838, ch. 120, had passed both houses of the Legislature on the 26th of January, 1838, but was not signed by the Speaker till the evening of the 27th, and it is contended that the act had no validity till this was done, and therefore could not have taken effect at a period anterior thereto. It is true that it is provided by the 18th section of article 2 of the Constitution of the State of Tennessee that 'no bill shall become a law until it shall be read and passed on three different days in each House, and be signed by the respective Speakers.' *But when this has been done, we think the law takes effect from the date of its passage by relation. The duties to be performed by the Speaker are not of a legislative, but ministerial, character.*"

In 3d Caldwell, 460, Shackelford, Judge, says: "When the act is signed by the Speakers of both Houses, (as it must be to become a law,) *it takes effect from its passage by relation, and not from the time it is signed by the Speakers; and if it be a repealing statute, it avoids any act done by authority of the repealed law in the interval between its passage and signing.*"

This act of 1875, repeals, *from and after its passage*, the act of 1873, and it was passed March 20, 1875, and as defendant's petition was not filed until March 22, 1875, the repealing act took effect of a date anterior to his proceedings; and the court, therefore, had no power, in any case, to enforce a tax in addition to the tax of 160 cents, the maximum rate allowed by law to be levied.

By the constitutional provision, art. 2, sec. 20, the Legislature had the power to pass the law, to take effect from and after its passage. The signature of the Speakers, although made at a subsequent day, related back to the date of passage. *The Governor signed it as taking effect from*

and after its passage, not from and after its approval by him, and under the 3 Caldwell case, the proceeding of defendant in error having been instituted between the date of passage and signing and approval by the Governor, his proceeding was in fact after the repeal.

3 Cald., 460.

And we submit, it is the uniform rule, that this court follows the State decisions as to the proper construction of the State Constitution.

This constitutional provision, in sec. 20 of art. 2, permitting the Legislature to pass the law to take effect from its passage, itself would negative the idea that a suit begun before the repeal could be maintained under the law repealed, and this 3 Caldwell case is very strong authority on that subject. If the Legislature had desired to save the remedy to existing suitors under the repealed statute, then it should have made a reservation and exception in their favor, and a broad repeal destroys and negatives any such idea or intention, and the whole act of 1873, being repealed broadly and without any reservation, abrogates it in toto and *for all purposes*.

Sedgwick on Statute and Cons. Law, 129.

But, even if we are mistaken in the two positions heretofore taken by us, to wit: First, that the defendant in error had no vested right to the remedy under the act of 1873, by reason of the repeal before the decree was made, or second, that the repeal was, as a matter of law, effectual before the institution of his proceedings. Yet, even then, the only ground upon which he can hope to stand is, that he can first establish that the proceedings instituted by him on the 22d of March, 1875, were as a matter of law, instituted before such repeal became a law, and then rely on section 49 of the Code of Tennessee, pased in 1858, which is as follows: "The repeal of a statute does not effect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under and by virtue

of the statute repealed," and the argument necessary to be made and sustained by defendant in error is, that although the Act of repeal was passed March 20, 1875, yet, as a matter of law, it did not become a complete and perfect law until the 23d of March, 1875, and the petition having been filed March 22, 1875, is protected by the language and intent of said section 49.

Let us analyze this section: In the first place, this repeal did not affect any right he possessed, for the reason before stated, *that the act of* 1873 *was a mere gratuity to him by the Legislature, and might be revoked at pleasure.* His only right was to a remedy co-extensive with the one in force when he contracted; nothing more or less. No duty was imposed upon the city that was binding upon the Legislature except the imposition of a tax by it equal to one per cent. No penalty had been incurred, and no question is made, nor is it contended that the act of 1875 destroyed the proceedings commenced, *but it only affected the remedy* and regulated the limit to which the city might go to carry out the contract.

Suppose, for instance, when "A" makes a contract, the law in force at the time provides that the jurisdiction of the Supreme Court shall be limited to cases where the amount or subject-matter in controversy exceeds $2,000 in value, and he makes a contract for the sum of $3,000, and brings suit in the lower court to enforce its payment, and while such suit is pending the Legislature passes a law that no appeal shall lie where the sum or property involved does not exceed $5,000. There is no question that such a law would be valid and no appeal would lie. This is simply a regulation of the remedy, and yet it takes away a right or remedy in force when his contract was made.

But another view of section 49 is equally conclusive against defendant in error. This section—49—was incorporated for the first time into the code of 1858, and by the Constitution of 1870, article 9, section 1, it was provided: "All laws and ordinances now in force and in use in this State not inconsistent with this Constitution, shall continue

in force and use until they shall expire, or be altered or repealed by the Legislature."

By article 2, sec. 20, of same, "no law of a general nature shall take effect until forty days after its passage, unless the same or its caption shall state that the public welfare requires that it should take effect sooner."

Now, the invariable practice of all legislatures in passing certain classes of laws, is to make them take effect from and after their passage where there is no constitutional inhibition on such power, and here, by this last section, power is clearly given. Shall this section 49 prevail against this constitutional provision, or shall it yield to it as therein contemplated? We say clearly it yields. But another principle is that this repealing statute is under this article 2, section 20, made to take effect from its passage without any savings to any classes of persons. Can the former legislature, which passed section 49, say that no subsequent legislature shall pass such a statute as that of 1875? Certainly not. This repeal of 1875 does not impair the contract, for the said Brown has his judgment, nor does it impair any remedy he had or can claim, for it increases his remedy. Then how is he injured in any right, duty, penalty, or proceeding by the act of 1875? The statement of the proposition is its own answer.

In Richardson *v.* State, 3 Caldwell, 122, a case (mainly relied on by defendant in error) is presented, wherein the plaintiff in error was indicted in 1860 for selling liquor to slaves. Before his conviction, and in the year 1866, the legislature repealed all laws appertaining to slaves, and particularly the sections of the code providing a penalty for such sale of liquor to them, and the Supreme Court held that such conviction was proper and that such prosecution was clearly within the savings of said section 49, because the law of section 49 was never repealed. The "*penalty*" prescribed for the sale of liquors was the "*penalty incurred*" which was protected by said statute. This penalty was the clear language of section 49, but here, before the court can arrive at the conclusion that defendant in error had any

right to the benefits of the act of 1873, it must determine that what was a mere gratuity has become an actual right, and that the same is not repealable. It must hold in contradiction to the case in 1 Colorado, 100, where a mechanic's lien was repealed after the work was done and the suit begun under the law giving the lien, and yet the repeal was determined to be only a regulation of the remedy. It must hold contrary to the laws allowing exemptions to be made effectual as against existing contracts. If a vested right was conferred upon T. E. Brown by this statute of 1873, then we have read to no purpose the various decisions of our State, as well as of this court and the other courts of the various States.

In 6 Wendell, N. Y., People *v.* Livingstone, 527, where a statute almost identical with our section 40 was construed and applied, Savage, Chief J., says:

"The common repealing clause is so much a matter of course with the Legislature, that the continuance of the suit, and the enforcing of the right, seems so much like a common law, or perhaps constitutional right, that we are unwilling that it has been or can be infringed. But it cannot be denied that the Legislature possesses the power to take away by statute what was given by statute, except vested rights.

"As it is undoubtedly competent for the Legislature to repeal absolutely, so it is competent, notwithstanding the repeal, to continue the law in force as to the proceedings commenced under it; to substitute another law in place of the old one, and to direct that all future proceedings in the progress of a cause, or the prosecution of a right shall be governed by such new law.

"It seems to me to have been the intention of the Legislature to confirm all rights which had accrued, to be enforced, however, according to the new remedy. The only right which was established under the old law was the right of appeal, and as the repealing statute gives *no right* to proceed under the old law, the party must proceed under the new, and hence Mr. Justice Marcy said those statutes take up proceedings in causes pending where they find them, and where the statute, under which these proceedings were commenced are repealed, the subsequent proceedings must be regulated by the revised statute."

This case is very much in point, and to it the attention of the court is earnestly invoked.

By the English common law, a statute took effect from the first day of the session at which it was enacted. (Dyer *v.* State, Meig's R., 237; 3 Coldwell R., 450.) As already shown by sec. 20, art 2 of the Constitution of 1870 of Tennessee, the Legislature is permitted, in its discretion, to fix the date at which a statute should take effect. If no date is fixed in the caption or act, it does not take effect until forty days after its passage; but they may fix it at an earlier date. No limit to this earlier date is prescribed by the Constitution. Therefore, the Legislature, being omnipotent, save so far as restrained by the Constitution, could fix the date as early as the first day of the session, accord to the rule of the common law; and in this case they fixed the date of its taking effect at that of its passage, the 20th of March, 1870.

The words, "*passage of an act*" have a precise technical meaning in Tennessee; they mean an affirmative vote of the majority of each House on three different days in favor of the bill. The Constitution says: "it shall be *passed each time in the House*," &c. "No bill shall become a law until it shall *have been passed on three different days in each house*, and shall have received *on its final passage*," &c.

Indubitably, the approval of the Governor is no part of the *passage* of the law; unless this be given, the law must *be* otherwise enacted—that is, by a full majority of all the members elect. We are not considering when it becomes a law, but when it is "*passed.*" By the Governor's approval, it becomes a law, but the approval is no part of the passage. In this act, the Legislature did not say, "it shall take effect from the date of its approval, or the date of its becoming a law, but from the date of its *passage*; and, on the face of the act, they have declared it was passed March 20, 1875. The Legislature, in using the words, "*from*" *its passage*, must be taken to have had in contemplation the act of passing they were then performing, otherwise their words do not mean their own import, but another thing.

This section 49 was enacted under the Constitution of 1834; under it the Governor's approval was not necessary, therefore, when the Legislature declared in that section, that a duty imposed, a right accrued, or proceeding commenced by an act was not affected by the repeal, the meaning must have been, "when the repealing act was passed by the two houses," as that was the settled meaning at that time.

The repealing section 81 of the act of March 20, 1875, ch. 92, in describing the laws repealed by it, describes the act of 1873 as an "*Act passed March* 18, 1873." On looking to that act, it was passed March 18, 1873, though not approved until March 24, 1873.

This is a legislative construction of the word "passed," made by the General Assembly, which enacted the repealing statute, and it is a legislative construction in the very act where the word was used we are now construing. It was not accidental, for in the same repealing section several other acts are referred to in the same way; and, indeed, it is the constant habit of the Legislature of Tennessee to describe previous act by referring to the dates of their passage, and never by reference to the dates of their approval by the Governor. The Constitution, after using this word, unmistakably, as meaning the affirmative votes of the Houses, then declares the act shall not take effect until forty days after its *passage*. Would it not be a perversion of this clause to say it meant forty days after the approval of the Governor, or after it became a law.

II.

Assuming that we have shown that the Legislature had power to repeal the acts of March, 1873, and January, 1871, that it has repealed them, the repealing act taking effect of a date anterior to the institution of Brown's proceeding, we will now examine the question of the taxing power, as it existed without reference to said acts of 1873 and 1871.

Doubtless the case will be controlled by the legislation acts as it existed at the date of the contracts. But we will follow the subject historically, from the earliest to the latest

dates, because we find an uniform, unvarying policy on the part of the Legislature *to limit the rate of taxation* to be imposed by the city.

By an act, special, and relating only to the city of Memphis, passed January 21, 1848, chap. 74 of the acts of that session, the power of the city to levy taxes for any and all purposes is expressly restricted to three-fourths of one per cent.

Acts of 1847–48, page 116, sub secs. 1 and 10.

This provision is repeated in the act of December 3, 1849, section 9.

Acts of 1849–50, page 11.

In both of these acts the restriction is contained in the same section which empowers the city to improve the streets, thus demonstrating that the limitation applies as well to the costs of such improvements as to taxes levied for any other purpose.

Section 6, of the act of January 2, 1852, amending the two acts just referred to expressly and in terms amends the 9th section of the act of 1849, in this: "To authorize the city of Memphis to impose on real estate an additional tax of 50 cents on $100 worth of real property over and above the amount allowed to be imposed by said 9th section of the act of 1849."

This demonstrates that up to 1852 the city was expressly restricted, in its tax-imposing power, to ¾ of 1 per cent. on the $100 worth of property with addition, just quoted, of 50 cents on the realty.

By the act of February 13, 1854, the territorial limits of the city were readjusted, and all the legislative acts in reference to it were gathered into one, as its charter, containing eight articles and many sections.

Acts 1853–54, page 285.

By article 4, section 1, (page 291) of said act, the power to lay taxes to defray the expenses necessarily incurred in administering the affairs of the city, is expressly limited to

one per cent. The same section authorizes a special tax to pay the city's funded debt; and another special tax to pay the difference between the dividends on its railroad stock, and the interest on the bonds issued in payment of subscriptions to the stock of railroads; and by the 18th sub-section of the 4th sec. of the same article, another special tax is authorized to support the public schools, the amount of which should not be less than one-twelfth, nor more than one-eighth of the ordinary city revenue.

The last clause but three of this act repeals in terms all former acts "contrary to or inconsistent with its provisions." This express restriction of the taxing power to 1 per cent. for the purposes of administering the affairs of the city, followed by express authority given to lay three special taxes, shows unmistakably the legislative intent to restrain the taxing power of the city to 1 per cent. for any and all purposes, other than the specified exceptions.

By the act of February 29, 1856, chap. 263, sec. 11, the city was empowered "to provide by ordinance for the grading and paving of all the streets, etc., etc., by the respective owners of the lots fronting thereon, and to enforce obedience thereto by such fines and forfeitures as the city may provide."

Acts of 1855–56, page 532.

No mention is made in this act of the taxing power.

The charter of the city was again amended by the act of February 20, 1860.

Acts of 1859–60, chap. 70, page 279.

Nothing is said in this act of the general taxing power of the city. By its 3d section, the city was authorized to issue bonds to a limited amount, and for specified purposes. $500,000, of bonds were authorized to be issued "for the construction and pavement of the principal streets and wharves," payment of which bonds, principal, and interest, was to be provided for by an adequate tax; but the bonds were to be issued only after a popular election, and two-thirds vote in favor of the issue. By the 7th section the city was author-

ized "as another mode for the construction of permanent streets, * * * to provide by ordinance for the levying, assessing, and collecting of a uniform special tax per foot, on all the property fronting on each side of said street," upon the owners of two-thirds of the real estate fronting on any street petitioning therefor.

Except as specially modified by these two sections, the taxing power remained as before.

The charter of the city was again amended on the 24th of November, 1866.

Private Acts of 1866–67, chap. 8, page 14.

The only provisions of the amending act relating to the taxing power or paving the streets, are as follows:

By the third section authority is given to issue eight per cent. bonds "for the purpose of making any public improvement" that might be deemed necessary; this authority to be exercised only after the ordinance for issuing the same should have been submitted to a popular vote, and approved by a two-thirds majority.

By the 4th section the city was authorized "to require that the cost of grading, paving, and repairing sidewalks, curbing and gutters alongside included, and of paving the entire carriage-way, gutters included, of any street, or any portion of any street or alley, shall be borne by the owners of the adjoining property."

By the 7th section the fiscal year was changed from July to January, and as that fiscal year was thereby made eighteen months in length, authority was specially given to levy a general tax of one and one-half per centum for that fiscal year.

No further legislation was had upon the charter until the 1st day of December, 1869, when it was again revised; and in the 51st section of that charter the limitation upon the taxing power to one per cent. is again emphatically repeated. By the 52d and 54th sections a special tax is authorized, sufficient to pay the interest upon, and to create a sinking fund for bonds of the city issued or to be issued.

Acts 1869–70, page 225.

And again, by the present charter, act of March 23, 1875, the limitation is to one dollar and sixty cents—one dollar for general purposes, such as "improving the streets, etc., etc.," and sixty cents for special enumerated purposes.

Acts of 1875, ch. 92, sec. 63, page 159.

It appears, therefore, that the provision of the charter of February 13th, 1854, enacting that "the Board of Mayor and Aldermen shall have power to lay and collect taxes for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, but the tax imposed for that purpose shall never exceed one per cent.," has remained in full force from 1848 to this day.

The exceptions were in favor only of the bonds of the city and the public schools.

In respect to paving the streets, therefore, the powers of the city were as follows:

1. The general power to improve the streets to be paid for out of the general one per cent. tax.

2. To pay for the improvement in the bonds of the city, under the two acts aforesaid of February 20, 1860, and November, 24, 1866; but that mode could only be adopted after a two-thirds popular vote in its favor.

3. By special assessments based on the frontage of the lots, under the 4th section of the act of November 24, 1866.

Upon this latter section the contract with Brown was based. It was declared unconstitutional and void by the Supreme Court of the State, as authorizing taxation not according to value.

There can be no pretense of a right to resort to the second mode of payment by bonds. Brown must therefore look to the city's general powers of taxation. The return showed that the tax had been already levied to the full extent of that power (Transcript, p. 7) and it should have been sustained as a complete answer to the petition.

If the case of Butz *v.* Muscatine, 8 Wall., 575, be relied on for the relator, we say, in answer, that in the subsequent case of The Supervisors *v.* The United States, 18 Wall., this

court has expressed quite different conclusions from those there announced, and the case might be regarded as overruled.

But however that may be, it is not in the way of plaintiffs in error. We are not called upon either to attack its conclusions, or to show that it is overruled.

By the Iowa statutes under discussion in that case, one clause limited the taxing power; the other, in respect to the payment of judgments, enacted simply that a tax sufficient to pay them should be levied. The defendant there was obliged to import the restriction from one clause into the other by implication. The court thought the alleged implication unfounded, saying that "nothing can be more simple and direct than the terms in which the levy of a sufficient tax is enjoined," and that there was no just ground for the interpolation of a restriction.

The relator in this case cannot put the plaintiff in error into any such predicament; he cannot lay his finger upon any statute authorizing a tax that could be devoted to the payment of his judgment, except the one per cent. general tax, always limited to that figure. The policy of the Legislature has been to limit the taxing power; that policy has never been departed from, except in special cases, the special purpose being always indicated, and none of them relating to Brown's case. It is as true here as in Supervisors *v.* The U. S., 18 Wall., 79, that "the Legislature of the State has made a clear distinction between ordinary county taxation, which the board of county supervisors may, at their discretion, levy, and special taxation for extraordinary emergencies, which can only be imposed in obedience to a popular vote."

The acts we have cited demonstrate the legislative intent to restrict the city to an annual tax of one per cent. for all ordinary expenses; and that whenever it was intended to allow the city to go beyond that figure for extraordinary expenses, the intent has been indicated by special legislative authority.*

* In order to avoid over-loading the brief with statutes, we print as an appendix hereto such of the statutes as are not quoted at large.

In the decision of the case of Brown *v.* The City of Memphis, 20 Wall., 289, this court, at page 309, refers to the act of 1849–1850, ch. 17, as conferring upon the city power to pave its streets. The reference was incidental and illustrative merely, the power of the city to improve its streets being ample under its charter, as shown by the next sentence of the opinion.

It is now suggested that sub-section 17 of the same act (Thompson & Steeger's Code of Tenn., section 1359) confers also the power "to lay and collect taxes" without limit, and that the taxing power may be derived from this statute.

We answer: The act of 1849–50 has no application to the city of Memphis. The section in question declares that "every corporation *thus formed* shall have full power, etc.," that is, formed under the general provisions thus enacted. The corporation of Memphis was not "thus formed," it being incorporated by special charter from the first.

Again: The act of 1849–1850, if it ever applied to the city of Memphis, was repealed so far as an unlimited power to tax was concerned, by the repeated subsequent enactments, already cited by us, limiting its powers of taxation to one per cent., except for special enumerated purposes not affecting Brown's case.

No power can be derived from the act of January 16, 1871, ch. —. This act will be found in the Code of Tennessee, (Thompson & Steeger,) vol. 1, pp. 406, 407. Section 491*a* to 491*e* inclusive. It refers to taxation for special objects outside of the usual and proper objects of the municipality, and expressly restricts the power so to be exercised to a rate that shall not exceed the rate of State taxation; and the public acts of 1875 show that the rate of State taxation for the year 1875 was 40 cents on the $100.

The special objects contemplated by this act are set forth in the second section, *i. e.*, when "the credit of the country, city, or town, is proposed to be given or loaned to, or in aid of any person, company, association, or corporation upon a vote of the people." (See section 491*a*.)

While section 491*c* of this act provides: "The taxes,

imposed by this act, shall not be greater than the State taxes on property and polls."

In 8 Heiskell (Tennessee) R., p. 864, City of Bristol *v.* Dixon *et al.*, the Supreme Court construe this statute in the following language: "It is true, that in reference to taxation for some special objects, outside of the usual and proper objects of the corporation, as in sections 491*a*, *c*, and 1361, the restriction exists, that the special taxes shall not exceed the rate of State taxation." This decision settles the construction of that statute as applicable alone to the special objects therein specified, and as restricted to the rate of State taxation. So, we repeat, no power to sustain Brown's application in this case can be derived from this statute.

But the case just cited is instructive on other points of the case before the court.

First, it decides that the improvement of the streets is one of the *ordinary purposes* to be administered in the affairs of the city; secondly, it derives the power to do so, and the power of taxation to meet the expense, from the express grants contained in the charter. That case is identical with the one at bar, except that the charter of the town of Bristol did not contain an express restriction to one per cent. of the town's power of taxation, as did that of the city of Memphis.

The charter of Bristol, section 12, provided "said corporation shall have authority to improve and keep in repair its streets," and, in the same section, "to levy and collect taxes for the purpose of carrying the necessary measures into operation, for the benefit of said town." (Page 867.)

The charter of Memphis up to the dates of Brown's contracts in 1866 and 1867, had the same powers, identically, that were conferred upon the town of Bristol. Like the Bristol charter, these powers were contained in the same section, that is both the power to improve the streets and the power to levy taxes to pay for such improvements; but in the Bristol charter the power to tax is *unlimited;* while in the Memphis charter, up

to the date of the execution of Brown's contracts, the power to tax was limited (as we have shown) expressly to one per cent. In the 8 Heisk. case, Chief Justice Nicolson, at page 869, puts the right of the plaintiff to his *mandamus* to collect his judgment by a special levy, on the express grant existing when Dixon made his contract, saying: "the act of the Legislature incorporating the town of Bristol, confers upon its corporate authorities the power to pave and keep in repair its streets, and also the power to levy taxes for the purpose of carrying the necessary measures into operation:" *Held*, they were bound to levy the tax. But suppose, in the same twelfth section of the Bristol charter containing these powers, there had been expressed a restriction (on this power) to tax to one per cent., would not the court have confined the power to one per cent., as this court has repeatedly held?

III.

The third assignment of errors is, that the court should not have ordered a tax payable only in lawful money of the United States.

As this question must be argued at length in No. 778, we will here merely state the proposition. Under the above statute of 1866, authorizing the city to require that the costs of the pavements should be borne by the owners of the adjoining property, the contracts were made with Brown, and the costs so undertaken to be charged.

The relator, Brown, in his petition quotes only a portion of the act of March 24, 1873. The remainder of that statute is as follows: "And in the levying of such additional tax, authority is hereby given to such town or city to allow as valid payments on said additional tax, any sum or sums, with interest, paid by persons in satisfaction or part satisfaction of said special assessments, illegally levied and collected as aforesaid." Brown specifically relied on this statute, insisting by his demurrer that the legislature had no power to repeal it, which demurrer was sustained. The third assignment submits that if the tax was to be

levied under the act, then the same act required that those who had paid the special assessments should be entitled to pay the new tax in their receipts for the former payments.

IV.

The fourth assignment of errors submits this question. In answer to the alternative writ, the city returned that under a former mandate of the court, it had, for the year 1873, levied a tax of 7 mills per cent., and for the year 1874, of 3 mills per cent.; that of the taxes thus levied $132,742.69 had been collected and paid over, and $170,000 remained uncollected, and that the latter was being collected and paid over as fast as possible. Notwithstanding these facts, the court below ordered a new levy for the full amount of relator's judgment, without regard to the past levies.

In the case of Rees *v.* Watertown, 19 Wall., at page 119, this court said: "In seeking to obtain for the plaintiff his just rights, we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown, should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property; upon the assumption that individual property is liable for the payment of corporate debts of the municipality, *it is only so liable for its proportionate amount*. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or the creditor. This is not the theory of law even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property to be ascertained by assessment, *and when the proportion is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources* There may be repeated taxes and assessments to make up delinquencies, but the principle and general rule of law are as we have stated."

The order of the court below was in violation of the principle here announced. The new levy was not ordered to

make good any delinquencies under the former levies; but because in point of fact they had not been paid, the city was required to make a new levy without regard to them. When the taxes levied for 1873 and 1874 matured, did not appear; what were the summary remedies for their collection, and whether the time for resort to such remedies had elapsed, did not appear; whether the former levies were collectible or not did not appear. The presumption is that they were collectible, being based upon a regular assessment.

The proper order would have been to enforce a tax sufficient, in connection with the former levies, to pay the judgment.

This court has repeatedly announced, that the defendant must be first put in default before a *mandamus* will issue. *The city here was not in default, to the extent of the former levies.*

The fifth and last assignment of errors is based upon the proposition that the city was required in making the levy, to allow for "delinquencies, insolvencies, and defaults;" in other words, it was required to levy a tax so large, that enough would be voluntarily paid to satisfy the judgment.

The proper order would have required the city to levy a collectible tax sufficient, &c. It should not have been put in a position that compels it from year to year to make repeated levies upon the prompt tax payer, without any opportunity to resort to those summary remedies afforded by the law to compel payment from all.

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Counsel for Plaintiff in Error.

APPENDIX.

AN ACT to reduce the several acts incorporating the town of Memphis into one act, and to amend the same.

SEC. 7. *Be it enacted*, That the Mayor and Aldermen shall have power within the city:

1. To levy and collect taxes *not exceeding three quarters of one per cent.* upon all property taxable by law for State purposes.

10. To open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean and keep in repair the streets, alleys and sidewalks.

SEC. 13. *Be it enacted*, That all acts and parts of acts contrary to, or inconsistent with the provisions of this act, or within the provisions thereof, be, and are hereby, repealed.

Passed January 21, 1848.

AN ACT to incorporate into one act the several acts incorporating the city of Memphis and the town of South Memphis, passed January 6, 1846, and January 21, 1848, and to unite the said towns into one, and extend the boundaries thereof.

SEC. 9. The Mayor and Aldermen shall have power to pass all laws necessary to preserve the health of the city; to prevent and remove nuisances; to establish night watches or patrols; to establish and regulate the grade of streets, alleys and other public highways; to license and regulate negro traders, livery stables, auctions, grocery, dry goods, forwarding, commission, and all other mercantile houses, coffee houses, tippling houses, confectioneries, brokers, bankers, peddlers, shows, circuses, theaters, and all other public amusements within the city; to keep in good repair, preserve and improve the streets, alleys, sidewalks, public landings and squares; to prevent the erection of buildings dangerous to other improvements, and to designate fire limits, within which wooden buildings shall not be erected; to restrain and punish gaming; to establish inspection laws within the city; and to establish and regulate markets, and to pass market laws and regulations; to establish and regulate fire companies and fire works; to regulate the sweeping of chimneys; to establish and regulate pumps, wells, cisterns, etc., on the streets, alleys, public squares, etc.; to convey water from the vicinity into the city, to lay and collect taxes for the use and benefit of the city, *which shall not exceed three fourths of one dollar for every hundred dollars' worth of property*, valued at cash prices; to open and widen streets, and to lay off new streets if necessary, always paying the party injured therefor; to license and regulate drays, carts, hackney coaches, and other vehicles in said city; to remove buildings dangerous or hazardous to other property, upon paying the owner the value thereof; to lay and collect such a poll tax as may be deemed reasonable, upon all the inhabitants of the city liable to pay a poll tax to the State; to prevent the introduction of contagious diseases into the city; to make quarantine laws, and enforce them within ten miles of the city; to establish and regulate hospitals, work-houses, and houses of correction; to establish a system of free schools within the city, free from sectarian influences, and to lay a tax not exceeding one eighth of the city revenue to support the same: *Pro-*

vided, That all the tax collected in any one ward for this purpose shall be expended in said ward: *And provided also*, That no more money shall in any one year be expended, or liability created on account thereof, in any one ward, than the taxes for said year in said ward amount to: *And provided further*, That upon the express wish of a majority of the voters in any one ward, no further taxes for free schools shall be collected or levied in said ward until otherwise requested by a majority of voters in such ward; to provide for lighting of lamps, and the erection of all buildings necessary for the use of the city; to improve the navigation of the Mississippi river, within the city limits; to preserve and improve the steamboat and flatboat wharves, and to fix the rate of wharfage; to regulate the anchoring and moving of steamboats and other boats at the various landings within the city, except as hereinbefore restricted; to license and regulate porters and their charges; coachmen, hackmen, and cabmen and their charges; to regulate all disorderly houses; to regulate the keeping and storage of gunpowder and all other combustible articles; to regulate the use of lights, stove pipes and flues, in all shops, stables, sheds and other like places; to provide for the inspection and the weighing or measuring of all kinds of provisions, food, provender, fuel, etc., for man or beast; to provide for the gauging and inspection of all kinds of liquors; to provide for the arrest and confinement, until tried, of all vagrants, riotous or disorderly persons within the city limits; to authorize the arrest and detention of all free negroes, slaves or other persons found violating any ordinance of the city; [to pass such laws as may be deemed necessary to control and regulate free negroes and slaves, and to punish them for violation thereof;] and to pass all other laws that may be necessary to carry out the full intent and meaning of this act, if not contrary to the constitution and laws of the State of Tennessee.

AN ACT to amend an act entitled "An act to incorporate the town of Tazewell," passed January 2, 1830.

(The only part of which, relating to Memphis, is:)

SEC. 6. *Be it enacted*, That the ninth section of an act passed on the third day of December, 1849, entitled "An act to incorporate into one act the several acts, incorporating the city of Memphis and the town of South Memphis, passed January 6, 1846, and January 21, 1848; and to unite the said towns into one, and to extend the boundaries thereof," be so amended as to authorize the Mayor and Alderman of said city to impose upon all of the real estate within its corporate limits, an additional tax, at the rate of fifty cents for every hundred dollars' worth of real property, valued at cash prices, over and above the amount or rate of taxation which the said corporate authorities are now authorized to impose upon real property, under the provisions of the act which this is intended to amend; and that any and all portions of said act, or other acts, as may be contrary to, or conflict with, the provisions of this act, be, and the same are hereby, repealed.

Passed January 28, 1852.

AN ACT to amend the charter of Memphis.

ARTICLE IV.

OF THE LEGISLATIVE POWERS.

SECTION 1. The Board of Mayor and Aldermen shall have power to lay and collect taxes for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city; *but the tax im-*

posed for that purpose shall never exceed one per cent., or one dollar on every one hundred dollars' worth of property within the city limits, liable to taxation, and valued at cash prices. The Board of Mayor and Aldermen shall also have power to lay and collect a special tax, for the sole and special purpose of paying the interest, as the same may become due, on the bonds authorized to be issued by the second section of this article, for the purpose of funding and paying off the present due debt of the city. Said tax may not be greater than may be necessary for the purpose; a separate account thereof shall be kept, and the money received under it shall not be applied to any other purpose whatever; and it is hereby made the duty of each and every Board of Mayor and Aldermen, immediately after organization as such, to adopt an ordinance imposing said special tax; and until such ordinance shall be passed and approved, no other ordinance or legislative act which they may transact shall be lawful or binding, or have any legal force or effect whatsoever. The Board of Mayor and Aldermen shall also have power (provided the dividend arising from the railroad or railroads in which the city may hold stock shall not be sufficient to meet the interest annually accruing on the bonds issued to said railroad) to lay and collect such additional tax as shall be necessary to pay the difference between said dividends on stock and the interest on bonds issued to said railroads.

SEC. 18. To establish a system of free schools within the city, free from sectarian influences, and shall lay a special and additional tax for their support and maintenance, which tax shall not be less than one-twelfth nor more than one-eighth of the ordinary city revenue.

Passed February 13, 1854.

AN ACT to amend the chapter of the United Firemen's Insurance Company of Nashville, passed February 25, 1851, and for other purposes.

SEC. 11. *Be it enacted*, That the sixth and seventh sections of the sixth article of the amended charter of the city of Memphis, passed 13th February, 1854, be, and the same is hereby, so amended as to authorize and empower the Board of Mayor and Aldermen of said city, from and after the passage of this act, to provide by ordinance for the grading and paving of all the streets, lanes, alleys and avenues in the city, by the respective owners of real estate fronting thereon, and to enforce obedience to said ordinance by such fines and forfeitures as they may provide, to be assessed and collected as other fines and forfeitures: *Provided, however*, That, when said real estate is owned by non-residents of the city, or by minors, said fines and forfeitures shall and may be collected by motion entered in the Common Law Court in the city twenty days before the meeting thereof, against said non-residents, minors, or their guardians, upon which judgment may be rendered at the first term, which judgment, when there is no personal property out of which it may be satisfied, shall operate as a lien upon the real estate ordered to be paved or graded, until the same is satisfied.

Passed February 29, 1856.

AN ACT to amend the charter of the city of Memphis and for other purposes.

SEC. 3. *Be it further enacted*, That the Board of Mayor and Aldermen of said city of Memphis shall have power to issue time bonds of said city, having not over thirty years to run, payable in such city in the United States as in the discretion of said Board will enable them to be negotiated on the best terms, having interest coupons attached, as not exceeding ten per centum per annum, within the following limits, and for

the following purposes: 1st, to an amount not exceeding five hundred thousand dollars, for the purpose of erecting permanent water works in said city; 2d, to an amount not exceeding five hundred thousand dollars, for the construction and pavement of the principal streets and wharves, or either, of said city, with iron, cobble-stone, or some system of construction and pavement of equal merit; 3d, to an amount not exceeding four hundred thousand dollars, to aid in the construction of a railroad connection between Memphis and St. Louis, Missouri, on as near an air line as practicable; 4th, to an amount not exceeding two hundred and fifty thousand dollars, to aid in the completion of the Mississippi and Tennessee railroad; 5th, to an amount not exceeding two hundred and fifty thousand dollars, to aid in the completion of the Memphis and Ohio railroad, and to the same amount for the Memphis and Little Rock railroad; and 6th, to an amount not exceeding two hundred and fifty thousand dollars, for the purpose of funding all or any of the present due debt of the city, or that not yet due, but for which city bonds may have been heretofore issued: *Provided, however*, That no such bonds shall be issued for either of the purposes specified in this section, or any other purpose, unless upon at least thirty days' notice of the time and place of election, the qualified voters of the city of Memphis shall instruct the Board of Mayor and Aldermen of said city to issue the same, by a majority of votes cast at such election: *And provided further*, That then no such bonds as specified in first, second, third and sixth classes above shall be issued until and unless said Board of Mayor and Aldermen, first before such issue, provide by ordinance for the regular and prompt payment of the annual interest on such bonds, and also provide an annual sinking fund to commence at least within six years after the issue of the bonds, and sufficient in amount to retire or redeem the same by maturity: *And provided further*, That no such bonds shall be issued to aid in the construction of a railroad to connect said cities of Memphis and St. Louis, until at least fifty miles of such road from or opposite Memphis northward shall be graded, bridged and made ready for the iron rails, and then only for the purpose of furnishing iron and equipments for so much of said road as is so graded, bridged and ready; said railroad company to secure the payment of the principal and interest of such bonds, at least one-half, by indorsing the bonds, and by first-class mortgage on their road-bed, fixtures, iron and equipments, and the balance by an issue of stock in the road to the city to the amount of the face of the bonds, which are used in payment for such stock: *And provided further*, No such bonds shall be issued as in this section before provided, for aid in said Memphis and Ohio, or Memphis and Little Rock Railroad Company until the company for whose benefit they are to be so issued shall first have made ample and full provision to secure the payment, as fast as it matures, of both interest and principal of the same.

SEC. 7. *Be it further enacted*, That, as another mode for the construction of permanent streets in said city of Memphis, the Board of Mayor and Aldermen shall have power, upon the owners and holders of two-thirds or more of the real estate fronting on any street, or part of street, asking or petitioning, in writing, that the same shall be done, to provide, by ordinance, for the levying, assessing and collection of a uniform special tax, per foot, on all the property fronting on each side of such street, or part of street, for the purpose of paying for the construction and paving of each street, or part of street, with stone, iron or such other durable or lasting material as shall be designated by the petitioners. Said Mayor and Aldermen shall further have power to provide, by ordinance, that any amount, but not exceeding one-fourth of the cost of such pavement, shall be paid from the general revenue of the city; the special tax above provided to be in addition to the other corporation

taxes on such property, and additional levies and assessments may be made, from time to time, until a sufficient sum is raised to pay for the work; and all assessments of special taxes levied on property for the purposes in this section specified shall be a lien thereon prior and superior to all other liens except the liens in favor of the State for State taxes, and may be enforced by judgment of condemnation and sale, as in other cases of city tax sales, or by bill in chancery, as said Board may direct.

Passed February 20, 1860.

AN ACT to amend the charter of the city of Memphis.

SEC. 7. *Be it further enacted*, That hereafter the fiscal year shall begin on the first Monday after the first Thursday in January in each year, and the present or fortieth corporate year shall extend to the first Monday after the first Thursday in January, 1868; and the Board of Mayor and Aldermen shall have power to assess *a special tax of one and a half per centum on all property liable to taxation*, for the ordinary expenses of the fortieth corporate year, and a like increase of taxation for the purposes set forth in the charter.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
JOSHUA B. FRIERSON,
Speaker of the Senate.

Passed November 24, 1866.

CHAPTER XXVI.

AN ACT to reduce the charter of the city of Memphis and the several acts amendatory thereof into one act, and to revise the same.

* * * * * * *

SEC. 51. *Be it further enacted*, That the General Council shall have power to lay and collect taxes for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city; *but the tax imposed for that purpose shall never exceed one per centum*, or one dollar on every one hundred dollars' worth of property within the city limits liable to taxation, and valued at cash prices.

SEC. 52. *Be it further enacted*, That the General Council shall have power, in addition, to lay and collect a special tax for the sole and special purpose of paying the interest, as the same may become due, on the bonds issued, or to be issued, by the city. The said tax shall not be greater than may be necessary for the purpose. A separate account thereof shall be kept; and the money received under it shall not be applied to any other purpose whatever.

SEC. 54. *Be it further enacted*, That the General Council shall have power to lay and collect a special tax not to exceed one-half per centum, or fifty cents on every hundred dollars' worth of taxable property, for the sole purpose of creating a sinking fund to be used in retiring the bonds of the city as the same may become due.

SEC. 78. *Be it further enacted*, That this charter shall go into effect the first Thursday in January, 1870; and all acts or parts of acts conflicting with the provisions of this act are hereby repealed, to take effect from and after date.

W. O. N. PERKINS,
Speaker of the House of Representatives.
D. B. THOMAS,
Speaker of the Senate.

Passed December 1, 1869.

Supreme Court of the United States,

OCTOBER TERM, 1877.

CITY OF MEMPHIS,

vs.

TALMADGE E. BROWN, &c.

No. 941.

STATEMENT OF CASE, AND ARGUMENT FOR APPELLEE.

Tracy & Co., Printers, 295 Second St., Memphis

Supreme Court of the United States,

OCTOBER TERM, 1877.

CITY OF MEMPHIS,

vs.

TALMADGE E. BROWN, &c.

No. 941.

STATEMENT OF CASE, AND ARGUMENT FOR APPELLEE.

On the 6th of April, 1874, the Supreme Court of the United States reversed a decree previously rendered by the Circuit Court of the United States, for the District of West Tennessee, sitting in equity, in favor of Talmadge E. Brown and against the City of Memphis, and remanded the cause with directions to enter a decree in conformity with the opinion of the Supreme Court, to be found in 20 Wallace, 289.

When the cause returned, the Circuit Court, on the 16th March, 1875, in conformity with the opinion entered a decree, after crediting all payments which in the meantime had been made, in favor of Brown and against the city for $292,133.47, and interest to accrue thereon, and the costs of the suit, and awarded execution to collect it.

The execution issued, and was returned "no property," and on the 22d of March, 1875, the United States, on the relation of Brown,

filed in the Circuit Court a petition stating the recovery of the decree, the issuance of the execution, the return thereon of no property, that the decree was unsatisfied, that the city had no property subject to levy or sale for the payment of the decree, and no means with which to pay it, that it had power to levy a tax for its payment, but refused to levy the tax and to pay the decree, and prayed the issuance of a writ of mandamus requiring the levy and collection by the city of a tax sufficient to pay the decree, in three annual installments, and the payment of the sums collected towards the satisfaction of the decree, from time to time, as collected.

An alternative writ of mandamus was issued returnable on the 26th of March, 1875, and was returned executed.

On that day the city filed its return or answer.

On the same day Brown filed his demurrer to the return.

On the 30th of March, 1875, the cause was heard upon the demurrer to the return, and the court was of opinion the return presented no sufficient defense, and sustained the demurrer. And the city resting on the demurrer, and the court finding the facts recited in the alternative writ to be true, rendered a judgment that the alternative writ of mandamus be made peremptory and final, and that the City of Memphis and its General Council proceed each year for the ensuing three years, to-wit: 1875, 1876 and 1877, respectively, at the same time and in the same manner that other city taxes are assessed, levied and collected, to assess, levy and collect upon all the property within the city taxable by law a tax in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars ($125,000) each year for the years 1875 and 1876 respectively, and so much of the said sum for the remaining year, to-wit: 1877, as may be required or necessary to pay and satisfy the balance of the said decree including interest and costs, not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as, and from time to time as the same may be collected, directly to the said Talmadge E. Brown, or into the court, to be forthwith paid to him without the further order of the court, until

the whole amount of the said decree, including the costs of the suit, and the interest that has accrued or may accrue thereon be paid and discharged.

And the court ordered that the Clerk of the court, whenever Brown should request it, issue each year, during the said years, 1875, 1876 and 1877 respectively, a peremptory writ of mandamus in accordance with the foregoing judgment to be served on the City of Memphis, and its Mayor and General Council in the manner prescribed by law, and that Brown recover of the city the costs expended and that execution issue therefor.

It is to the foregoing judgment that the present writ of error has been sued out. In the meantime taxes for all three of the years, 1875, 1876 and 1877, have been assessed and levied, and in part collected, and paid over to Brown.

In order to a full understanding of the questions to be argued, I will now state the character of the debt for which the decree of 16th of March, 1875, was rendered, and the several defenses to the alternative writ of mandamus set up in the return, and the grounds of the demurrer thereto.

In the year 1867, the City of Memphis, under the provisions of an act of the Legislature of Tennessee, passed on the 24th of November, 1866, the material parts of which are copied below in the argument, contracted with two distinct firms, one known as Taylor, McBean & Co., and the other as Forrest, Mitchell & Co., for paving certain of its streets with what is known as Nicolson pavement, and undertook to charge the cost thereof to the owners of the abutting property, proportioning the same according to the frontage of each lot on the street paved, and to require that the owners of the lots should pay such cost as debts contracted by themselves.

The two firms mentioned completed portions of the work they respectively contracted to do, and in the year 1868, T. E. Brown & Co., composed of Talmadge E. Brown and J. Langdon, since deceased, and of whom Brown is the survivor, succeeded to all the rights of the said two firms, and completed all the work under all

their contracts to the entire satisfaction of the city, by whom the same was thereupon accepted.

A great many of the property owners on whom the same was charged in the manner stated above paid the portions of the cost of the pavement allotted to them, but a great many others refused to pay their proportions. Bills in the Chancery Court of Shelby County, as contemplated by the act of the Legislature prescribing the mode of collecting the cost of the pavement, were then filed, and the causes were taken from that court to the Supreme Court of Tennessee, where, upon a final hearing, it was decided that the act of the Legislature was unconstitutional, and that the city had no power to make the abutting property owners pay the cost of the pavement, and they were discharged therefrom.

See the case reported under the style of Taylor vs. Chandler, 9 Heiskell R., p. 349.

Brown, as surviving partner, brought suit in the Circuit Court of the United States, for the District of West Tennessee, on the contracts made by the city with Taylor, McBean & Co., and Forrest, Mitchell & Co., of which T. E. Brown & Co. had become the assignees, as stated above, for the sums due for the work of laying down the pavement, not paid by the property owners, against the City of Memphis claiming that the city was liable by reason of an express guaranty of payment by the property owners contained in the contracts as well as by being the only party in fact and in law to the contracts and the beneficiary of the work done under them.

Such proceedings were had in the suit that on the —— day of March, 1872, Brown, by the decree in equity of the Circuit Court of the United States, for the District of West Tennessee, recovered of the City of Memphis the sum of $488,993, besides the costs of the suit.

The cause was then taken to the Supreme Court of the United States, where the decree was reversed (20 Wallace, 289), and the cause remanded to the Circuit Court, and the decree of 16th March, 1875, before mentioned, was rendered in pursuance of the mandate of the Supreme Court.

On the 18th March, 1873, after the decision in 9 Heiskell, 349 mentioned above had been made, the Legislature of the State

of Tennessee passed an act entitled "an act to amend the charters of all the incorporated towns and cities in the State," copied further on, authorizing the levy of a special tax to pay the entire cost of improvements which had been constructed under the circumstances under which the pavement had been laid down by T. E. Brown & Co

The petition of Brown for the alternative writ of mandamus averred that the debt due him, as appeared by the said decree, accrued in the manner contemplated by the said act of the Legislature, and stated the facts to show that such was the case and claimed that in addition to the city's other powers of taxation, the power to levy the tax to pay the decree was conferred by the said act.

The petition referred to the record in the suit in which the decree in equity had been recovered then remaining in the Court for particularity as to the matters it stated, and prayed that the same might be taken and considered as a part of itself.

The return of the city did not deny any of the facts recited in the petition and the alternative writ as the basis of the relief Brown claimed to be entitled to, but tacitly admitting the said facts to be true (Von Hoffmann vs. Quincy, 4 Wallace 548, Code of Tennessee, sections 2910 and 2929) it set up the following grounds of defense, to-wit:

1. That there was no money in the city treasury, and the General Council had no power under the charter of the city to levy a greater tax than one per cent., or one dollar on the one hundred dollars of taxable property, for all the purposes of government, including officers' salaries, police, fire, health and hospital departments, and the other current expenses of the city government, including the repair and improvement of streets, alleys, wharves, etc. That it had power to levy other taxes as follows: Two mills per cent. for interest on the bonded debt of the city; two and one-half mills per cent. for a sinking fund to retire the bonds of the city; one mill per cent. for maintaining schools, and one-half mill per cent. for the payment of judgments. But the last named special taxes were required by law to be strictly applied for the purposes for which they were allowed to be levied, and therefore, they

could not be applied to Brown's debt. That the city had already imposed the one per cent. which it was allowed to levy for general purposes, and therefore had exhausted its powers of taxation. That the act passed by the Legislature of the State of Tennessee on the 18th March, 1873, copied herein, had since, and during the then sitting of the Legislature been repealed, and was not then the law of the State.

2. That the alternative writ commanded the levy of a sum sufficient to raise $125,000 each year for the three years 1875, 1876 and 1877, after making due allowance for all delinquencies, insolvencies and defaults, when in fact and in law the property of the citizen could not be taxed for the delinquency of any other citizen; and furthermore, the decree in Brown's favor was only $292,133.47, and the sum commanded by the writ to be raised was $375,000, or an excess of $83,133.47.

This last statement is a clear mistake of fact. The writ commanded the levy and collection for the three years of $125,000 each year, "or so much thereof as might be necessary for the purpose of satisfying the said decree, including the interest thereon and the costs."

3. That by a mandate of the Court issued on the — day of June, 1873, the city had levied a tax of seven mills per cent. for the year 1873, and a tax of three mills per cent. for the year 1874, in favor of Brown, and there was uncollected on the said levies a balance of $170,000, all of which was on account of Brown's decree or claim then sought to be enforced, and which was being collected and paid over to him as fast as possible. That there had been collected and paid over to Brown from said levies about $132,742.69, all on account of his said claim, and if the city was required to relevy the same burdensome tax on those who had paid, it would be doing a great injury to the prompt taxpayers, and its doing so would operate as an inducement to taxpayers to resist the payment of the tax.

The decree of the 16th March, 1875, shows that the sums just stated to have been collected and paid over to Brown were credited on the sum due him, and the decree entered for the balance, and the return does not claim the contrary.

4. That by law the ninth and tenth wards, generally denominated the new limits, were exempted from the payment of any tax to pay certain indebtedness of the city, and the writ did not show whether the indebtedness was one of the excepted classes or not; and the determination of that question was a judicial one which the city could not safely decide for itself, and should be determined on the face of the writ.

5. That when the contracts were made for laying the pavements by which the debt became due to Brown, it was understood and stipulated that the owners of the abutting property should pay for the pavement in front of each lot, and many persons paid for such pavements according to the terms of the contracts. And when the act of 18th of March, 1873 before referred to, was passed, it provided that such persons as had paid for the pavements and held receipts therefor, might be excused or released from paying the tax levied to pay for such pavements. Wherefore the city could not levy and collect the tax from all persons subject to pay taxes as commanded by the writ.

The grounds of Brown's demurrer to the return are:

1. It presents no sufficient ground for the refusal of the city to do what the alternative writ of mandamus requires it to do.

2. The act of the 18th March, 1873, gave full power to levy the tax to pay Brown's decree, and the Legislature, if it had attempted to do so, had no power to repeal it so as to defeat Brown's right to require the levy of the tax.

3. The Court in ordering a levy of taxes to pay the decree could not consider past levies which had not been collected, and might never be.

4. As a matter of fact the debt due Brown had accrued since the act of 1867; at any rate the defendants did not show it accrued before, and the Constitution and law require all taxes to be equal and uniform, and that no one species of property shall be taxed higher or lower than any other property of equal value, and prevent the exemption of any property from taxation; and

the act of March, 1873 makes no discrimination in favor of any person or class of persons.

5. The Constitution and the law require that taxes be levied upon the principles stated in the last paragraph; and hence on account can be taken of the fact that some of those upon whom special assessments were laid to pay the cost of the pavements laid down, paid the assessments levied upon them—the said special assessments were paid voluntarily and without lawful authority and constitute no defense to a lawful levy of taxes to pay the decree. If the parties who had so paid had any equities they were against the city under the said act of 18th March, 1873, and were not against Brown.

The questions for the consideration of the court arise upon the demurrer.

I

The main question is, Did the City of Memphis have the power to levy the tax the judgment required it to levy?

To answer this question it is proper to examine the legislation of the State having reference to the city.

1. By chapter 110 of the Acts of the Legislature of Tennessee of 1870, passed July 7, 1870, it was enacted—

"That all the property, whether real or personal, held or owned by either of the municipal corporations in this State for public purposes, such as public squares, public parks, water-works, fire engines, lots, houses, horses and carts for the use of fire companies and for the use of the corporation, and which are necessary for the convenience and use of the public, shall be exempt from attachment or sale by execution or other legal process."

Possibly this statute was only in affirmance of the pre-existing law.

Dillon on Municipal Corporations, sec. 446.

In addition, therefore, to the *fact*, admitted in the record, that the city has no property out of which to pay the debt to Brown,

and no means with which to pay it, we have the *law* that the property it possesses cannot be subjected to that purpose.

2. The act of 13th February, 1854, Acts of 1853–1854, chapter 195, article IV, sec. 1, page 291, provided that, "The Board of Mayor and Aldermen should have power to lay and collect taxes for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, but the taxes imposed for that purpose should never exceed one *per centum*, or one dollar on every one hundred dollars worth of property within the city limits liable to taxation, and valued at cash prices."

Almost the same language is repeated in section 51, ch. 26, of the Acts of 1869–1870, p. 238, being the act of 1st of December, 1869, entitled "An act to reduce the charter of the City of Memphis and the several acts amendatory thereof into one act and to revise the same."

By section 63, ch. 92, of the Acts of 1875, approved on the 23d of March, 1875, Acts of 1875, p. 159, it is provided in reference to such cities in Tennessee as Memphis, "That no such municipality shall assess, levy or collect a greater rate of taxes than one dollar and sixty cents on each one hundred dollars worth of taxable property in such city for any and all purposes."

And section 64 of the same act declares, "That it shall be the duty of the General Council, immediately after the assessment of the property of the city for taxation, to make out what is known in legislative parlance a budget, and apportion the one dollar and sixty cents to defray the various items of expense incident to carrying on the city government; *provided*, that not more than one dollar, or one per cent., shall be appropriated to defraying general expenses, such as police and fire departments, officers' salaries, water and lights, improving or repairing streets, etc., and not more than sixty cents shall be appropriated to special purposes; of this amount twenty cents shall be appropriated to the payment of interest on the bonded debt, twenty-five cents shall be appropriated to providing a sinking fund to retire the bonded indebtedness, ten cents shall be appropriated to the maintenance of the city schools, and five cents shall be appropriated to the payment of judgments."

Acts of 1875, p. 159–160.

I take it that the act of 1875 repealed the provisions containing the limitations in the acts of 1854 and 1869, the one expressly and the other as being inconsistent with its provisions.

It is claimed on behalf of the city that these provisions of the statutes operate as a limitation on its powers of taxation, and therefore that it had no authority to levy the tax to pay the debt due Brown which it was commanded to levy by the judgment of 30th of March, 1875.

So far as the limitations in the act of 23d of March, 1875, are concerned they are inoperative as to the power to levy the tax to pay Brown's decree, because on the 22d of March, 1875, before the act took effect, Brown had commenced this suit. This question will be argued further on.

As to the limitations contained in the acts of 13th of February, 1854, and 1st of December, 1869, those acts, as already observed, were repealed by sec. 81, of ch. 92, p. 168, of the Acts of 1875, which took effect from and after its passage (see section 82), and before the judgment of 30th of March, 1875, requiring the levy of the tax to pay Brown's debt was rendered, and may be left out of the case, as the limitations certainly could not have effect after the acts were repealed.

But aside from this, the limitations extend only to "taxes for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city." I understand this language to mean something quite different from a tax specially authorized for the particular purpose of defraying the cost of some extensive improvement the city might undertake—the paving of the streets with Nicolson pavement or with stone, for instance. Such expenses are not usual or ordinary, nor can they be said to be *necessarily incurred.* The city may or may not incur them, as in the judgment of its General Council may be most advantageous. In other words, such expenses are extraordinary and discretionary, and therefore the taxes to pay them are not embraced within the limitations, and may be at a rate exceeding one per cent., if the cost of the improvement requires they should be.

It is plain by its careful reference *to the purpose* the Legislature

understood there might be, and probably would be, taxes levied for *other purposes* than "to defray the expenses necessarily incurred in administering the affairs of the city." And by abstaining from affixing any limitation to the rate or amount of the levy, when it became necessary to levy taxes *for such other purposes*, the Legislature plainly indicated its intention that in making such levies there should be no limitation, except the general one, always implied, that the levy should not be greater than might be required for the purpose.

Again, I deny that the limitations in the special acts of the Legislature, having reference only to the City of Memphis, of 13th of February, 1854, and 1st of December, 1869, or in any other similar acts, could have the effect of restricting the powers of taxation as conferred upon the city by general statutes applicable to the whole State, or the Act of 16th January, 1871, Acts of 1870–1871, ch. 50, p. 58–59, and the Act of 18th March, 1873, Acts of 1873, ch. 67, p. 102, for instance, passed long after such special statutes, and having no reference to them.

And, if the court holds, as I hope it may, that the act of 24th November, 1866, Acts of 1866–1867, (private) ch. 8, sec. 4, p. 19–20, authorizing the city to contract for the laying down of the pavement and to pay the cost thereof, authorized the levy of a tax adequate to pay the cost of the pavement, or that the power to levy such a tax is necessarily to be implied from the city's power to cause the streets to be paved, then, I insist that neither the limitation in the prior act of 13th February, 1854, nor the limitation in the subsequent act of 1st December, 1869, can curtail or restrict the rate or amount of the taxes so authorized to be levied.

In Butz vs. Muscatine, 8 Wallace, 575, the creditor had a judgment, and was asking a mandamus to compel the levy of a tax for its payment. The city urged as a ground why the mandamus should not issue that by the laws of the State it was not permitted to levy a tax exceeding in amount one per cent. upon the taxable property of the city for all purposes in any one year. That the amount had been levied for the year, and a part had been collected and a part was delinquent. That the entire amount collected had been expended for the necessary current and incidental expenses of the city, and that the entire amount levied and collected for the

next year would be needed for the same purposes for that year, and that those expenses were a paramount lien upon the fund.

The act containing the limitation of the amount of taxation, relied on by the city was special, and contained in an amendment to its charter, and was to the effect that the Council might levy a tax of not exceeding one per cent. upon the value in any one year, of the property of the city assessed as subject to taxation.

The general power to tax relied on by the plaintiff was contained in a general law of the State, which it was not denied was broad enough to embrace it.

The court decided that "the limitation in the special act touching the exercise of the power of taxation by the City Council applied to the ordinary course of their municipal action. Whenever that action was voluntary, and there was no debt evidenced by a judgment against the city to be provided for, one per cent. was the maximum of the tax they were authorized to impose. But when a judgment had been recovered the case was within the regulations of the general law. These provisions were then brought into activity, and operated with full force until the judgment, interest and costs were satisfied. The limitations in the special act had no application in such cases, and imposed no check, if larger taxation be necessary."

It is not necessary for one to go to the point of insisting that the recovery *of every* judgment, whether for ordinary or extraordinary expenses, calls into exercise a power of taxation not subject to the limitations imposed by the acts of 13th February, 1854, and 1st December, 1869. Even if that general position is not correct, what I contend for, namely: that when the debt is not incurred in the ordinary or usual course of the city's affairs, but in making some extraordinary or unusual improvement, and the power to levy a tax to pay the cost of such improvement exists, such power is not subject to the limitations in the acts of 1854 and 1869, may well be.

While it is true that in the subsequent case of Supervisors vs. United States, 18 Wallace, 71, the court adopted a construction of the general statute involved in Butz vs. Muscatine, which held that it did not of itself authorize the levy of a specific tax to pay every

judgment recovered, yet, as I understand it, the force of the decision in the particular in which I rely upon it is not impaired.

If the general statute had really conferred the power to levy such a tax as the court in Butz vs. Muscatine held it did, I do not understand the court in Supervisors vs. United States to deny that the limitations in the special act relating to Muscatine upon the power contained in the general statute would have been ineffectual to prevent the levy of the tax under the general statute.

Besides, it may be fairly argued that the court did not, in Supervisors vs. United States, yield the construction it had put upon the statute in Butz vs. Muscatine. It merely deferred to the authority of the Supreme Court of the State in construing a statute of the State.

3. By Section 1359, sub-section 17 of the Code of Tennessee, every municipal corporation is given "full power and authority to levy and collect taxes upon all property and privileges within its limits, which are or shall be taxable by the laws of the State."

It is true this provision, by its position and connection, and possibly by its phraseology, appears to have reference specially to municipal corporations organized under the provisions of the Code, sections 1349 and following. But this court, in City of Memphis vs. Brown, 20 Wallace, 289, 291, 309, treated sub-section 7 of section 1359 as applicable to the City of Memphis. And if sub-section 7 applies I take it that sub-section 17 does also.

It will be observed that there is no limit to the rate of taxation authorized by sub-section 17, Section 1359.

By the act of 16th January, 1871, Acts 1870–1871, ch. 50, p. 58–59, it is enacted "that the several counties and incorporated towns in this State may and are hereby authorized to impose taxes for county and corporation purposes respectively, in the following manner and upon the following conditions:"

There are two conditions specified, and only two. The first is that the taxable property shall be taxed according to its value on the principles established in regard to State taxation. And the second

is that the credit of no county, city or town shall be given or loaned except upon the consent of the governing body of the county, city or town, and the assent of three-fourths of the qualified voters at an election held for the purpose of taking their sense upon the proposition.

There is no limit as to the rate or amount of taxes the county, city or town may impose.

The act is entitled "An Act to enforce Article II, Section 29 of the Constitution to authorize the several counties and incorporated towns of this State to impose taxes for county and corporation purposes," and very clearly was intended to regulate and provide for the whole subject of taxation by cities, incorported towns and counties.

The section of the Constitution referred to is as follows: "The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no county, city or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of suchcounty, city or town, and the assent of three-fourths of the votes cast at said election."

The residue of the section is not material here.

It will be noticed that nothing is said about cities, either in the Constitution or in the act of the Legislature. They have always been understood and treated, both in the legislation and in the judicial decisions, as being embraced by the term "incorporated towns."

It is not seen why the act of 16th January, 1871, does not confer full authority for the levy of the tax to pay Brown's debt, as ordered by the judgment of 30th March, 1875.

It is attempted, however, on behalf of the city to confine the inquiry as to whether the city had the power to levy the tax to the

act of 18th March, 1873, Acts of 1873, ch. 67, p. 102, to be noticed more particularly further on.

It is true the petition and the alternative writ refer particularly to the act mentioned, and state it confers the power to levy the tax. But nothing in the petition or writ limits the power invoked by Brown to that conferred by the act, nor precludes him from insisting upon the exercise of any other grant of power adequate to the relief he prays, though contained in a different act.

But, if it is true that the petition and alternative writ are so framed as in words to ascribe the power to levy the tax to pay Brown's debt exclusively to the act of 18th March, 1873, still, if the power to levy the tax was not granted by that act, but was contained in some other law, the court would itself take notice of such other law and would refer the judgment to it, and would reject the reference to the act of 1873 as surplusage.—*Utile per inutile non vitiatur.*

Broom's Legal Maxims, * p. 559.

The alternative writ of mandamus ordinarily stands in the place of a declaration at common law, and is to be tested by the same rules.

High on Extraordinary Legal Remedies, Secs. 449–451.

A declaration should set forth only matters of fact, and not matters of law, as the court judicially takes notice of the latter.

3 Robinson's Practice, p. 510–511 and 530.

The Code of Tennessee, Sec. 2881, provides—

"All pleadings shall state *only* material facts, without argument or inference, as briefly as is consistent with presenting the matter in issue in an intelligible form."

This provision is applicable to the pleadings in this case.

Revised Statutes U. S., Sec. 914.

Therefore, I insist Brown is not obliged to rely exclusively on the act of March 18th, 1873.

But I will now proceed as if he could look to no other law for authority for the judgment he is seeking to sustain.

There is no mistaking the language of that act, which is as follows:

"That where ar y incorporated town or city has by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which levy and assessment was afterwards declared void by the Supreme Court of the State, said town or city shall have the power to levy a tax in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made, and in the levying of such additional tax, authority is hereby given to such town or city to allow as valid payments on said additional tax any sum or sums, with interest, paid by persons in satisfaction or in part satisfaction of said special assessments, illegally levied and collected as aforesaid."

It is not denied on the other side that this act is broad enough to confer the power to levy the tax; nor is it denied that the act was a constitutional and valid law.

Whether denied or not, there can be no doubt of this latter proposition. It has, in effect, been settled by the decision of Lea vs. The City of Memphis, Mss. Op. Sup. Ct. of Tennessee, to be referred to again. And see

Satterlee vs. Matthewson, 2 Peters, 380.
Watson vs. Mercer, 8 Peters, 88.
Crawford vs. Br. Bk. of Mobile, 7 How. 279.
Schenley vs. Commonwealth, 36 Penn'a St. 29, 57.
Cooley's Constitutional Limitations, * p. 373.
Brandon vs. Green, 7 Humphreys, 130.
Coon vs. Brazleton, 2 Swan., 273.
Wynne vs. Wynne, 2 Swan., 405.
Gardenhire vs McCombs, 1 Sneed, 83.

It is claimed, however, that the act was repealed before the judgment of the 30th of March, 1875, was rendered, and therefore was no authority for the judgment when rendered, and this is the next question I will notice.

4. The act of the 18th of March, 1873, it is not denied, remained in force until the repeal by sec. 81 of the act of 23d of March, 1875, Acts of 1875, ch. 92, p. 167–168.

ASSOCIATION

Brown's decree, under the mandate of this court, was entered on the 16th of March, 1873.

His petition for a writ of mandamus to compel the levy of the tax to pay his decree was filed and the alternative writ of mandamus was granted, and was in fact issued, on the 22d of March, 1875.

The repealing act, though passed on the 20th of March, 1875, was not approved by the Governor until the 23d of March, 1875.

The repealing act, by the Constitution of Tennessee, did not become a law until it had received the approval of the Governor.
Constitution of 1870, Article II, Sec. 18. *

So it did not become a law until Brown had his decree, and had filed his petition and obtained the writ, and was in fact pursuing the remedy to obtain payment given him by the act sought to be repealed.

If it be true that Brown had a remedy to compel the levy of the tax to pay his decree outside the act of the 18th of March, 1873, then the court will impute the judgment of the 30th of March, 1875, to the law giving him the remedy, and the repeal of the act of March, 1873, is not material and need not be noticed.

But if that act alone gave him the remedy, and if without it he could not compel the levy of a tax to pay his decree, then I claim the repeal as to Brown was unconstitutional and void as impairing the obligation of the contract between him and the city.

In Green vs. Biddle, 8 Wheaton, * p. 1, it was decided that a law of Kentucky which denied to the owners of land in certain cases a remedy to recover the rents and profits of it from the occupier, accruing prior to the judgment of eviction, violated a provision in the compact between Virginia and Kentucky to the effect that all private rights and interests in lands in Kentucky derived

* Before 1870 the Governor had no veto power. Since then under above section acts take effect from approval by Governor, as do acts of Congress from approval by President. (See cases cited on 4 Abbotts Nat. Dig. p. 223)

from the laws of Virginia should remain valid and secure under the laws of Kentucky and should be determined by the laws then existing in Virginia.

8 Wheaton, * p. 75–76, 81–85.

In Woodruff vs. Trapnall, 10 Howard, * p. 190, it was held that a State law repealing a former law by which it had been enacted that the bills of a certain bank should be received in payment of all debts due to the State, violated a contract between the State and the holders of the bills of the bank and was void.

The same was the holding in Furman vs. Nichol, 8 Wallace, 44, where the law repealed gave the holder of the bills of the bank the right to pay all taxes as well as all debts due the State in such bills. In that case it was decided that the repealing act was not valid even as to the repeal of the right to pay taxes with the bills.

In Curran vs. the State of Arkansas, 15 Howard, * p. 304, the State had chartered a bank of which it was the only owner or stockholder, and the bank had become insolvent and had been dissolved. A law of the State undertook to appropriate the property of the bank to the general purposes of the State, leaving the creditors of the bank no legal remedy against its property. Held, the law impaired the obligation of the contract between the creditors and the bank and was void. Justice Curtis, delivering the opinion, said:

"True, the law does not touch the right of action against the bank; it only withdraws the real property from the reach of legal process, and thus affects the remedy. But it by no means follows because a law affects only the remedy that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same."

15 Howard, * p. 319.

In Hawthorne vs. Calef, 2 Wallace, 10, a statute of a State made the stock of stockholders in a chartered corporation liable to

the corporation's debts, upon certain conditions, though it imposed no personal liability on the stockholders. Another statute repealed the first. Held, that the repealing statute as to the creditors of the corporation existing at the time of the repeal impaired the obligation of their contracts and was void.

In Brownson vs. Kenzie, 1 Howard, * p. 311, a mortgage contained a valid power to sell on the failure of the mortgagor to pay the mortgage debt as stipulated, and to convey the title to the purchaser absolutely. Subsequently the Legislature enacted a law giving the mortgagor twelve months in which to redeem the property from the purchaser at the sale, and prohibited the sale unless the property brought two-thirds of its appraised value. It was held that the law so altered the remedy of the creditor as to impair the obligation of his contract, and was therefore void.

The same principle was again decided in McCracken vs. Hayward, 2 Howard, * p. 608, where an execution issued on a judgment based on a contract, was levied on real property and the question was whether a State law, passed after the judgment was rendered forbidding a sale of the property under the execution unless it brought two-thirds its appraised value, could have the effect of preventing a sale. The court decided it could not.

And see Webster vs. Rose, 6 Heiskell, p. 93, for a decision on the same question by the Supreme Court of Tennessee.

In City of Memphis vs. Bethel, decided by the Supreme Court of Tennessee at the fall term, 1875, at Jackson, a certified copy of which is furnished the court, the suit was to compel the levy by the City of Memphis of a tax to pay the interest which had accrued and remained unpaid on certain of its bonds. The power to levy the tax, it was claimed, was conferred by section 52 of the act of 1st of December, 1869, Acts of 1869–1870, ch. 26, p. 238, and perhaps also by former acts, as follows:

"The General Council shall have power, in addition, to lay and collect a special tax for the sole and special purpose of paying the interest as the same may become due on the bonds issued or to be issued by the city. The said tax shall not be greater than may be necessary for the purpose. A separate account thereof shall be

kept, and the money received under it shall not be applied to any other purpose whatever." On the part of the city it was insisted that the power to levy the tax was taken away by sections 63 and 81, of ch. 92, of the Acts of 1875, being the act of 23d of March, 1875, before referred to, and there was no question but the language was broad enough to accomplish that result. The court held that the repealing act, so far as it affected the power to levy the tax to pay the interest which had accrued or might accrue on the bonds issued before its passage, impaired the obligation of the contracts between the city and the bondholders, and was therefore unconstitutional and void, and that the tax to pay such interest must be levied as if no repealing act had been passed.

In Von Hoffman vs. Quincy, 4 Wallace, 535, there was a power in the city at the time it issued the bonds from which the coupons for interest on which the judgment was based were taken, to levy a special tax to pay the interest as it accrued. Afterwards, in the year 1863, the Legislature undertook to repeal the legislation by which the power had been conferred. And when the creditor had recovered a judgment, and sought by mandamus to compel the levy of a tax to pay it, the city set up as a defense to the proceeding that its power to levy taxes to pay its debts and current expenses had been so limited that the amount it could raise would not be sufficient for both purposes; and whether anything would remain to apply to the debts, after paying the current expenses, was not made to appear to the court.

The question was whether the repealing legislation, so far as it affected the collection of the debts created before its repeal, was valid.

The court, the judges being unanimous, announced this principle: "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. * * * * * * * Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void."

Then, applying the test to the case before it, the court said:

"When the bonds in question were issued there were laws in force which authorized the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time upon the entire debt. But for the act of 14th February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by the act will be insufficient; and it is not certain that anything will be yielded, applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. * * * * * * The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if the act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion."

And see Butz vs. Muscatine, 8 Wallace, 575.
Mayor vs. Lord, 9 Wallace, 409.
Supervisors vs. United States, 18 Wallace, 71.
Cooley's Constitutional Limitations, * p. 292.

I am aware it will be said here on the other side that the act of March 18th, 1873, was passed after the contracts between Brown and the city had been made, and after the work had been performed, and so did not enter into the contract so as to form a part of the obligation of it, and therefore could be repealed without impairing his rights.

If it be true that on the 16th of March, 1875, when Brown obtained his decree against the City of Memphis, the only remedy he had to obtain payment was by the levy of a tax under the act of 18th of March, 1873, as is contended on the other side, then I insist that by the very fact of the rendition of the decree Brown acquired such an interest in the remedy provided by the act of 1873, that it could not, as to him, be repealed until his decree was fully satisfied.

It is true the contract under which Brown was entitled to his re-

covery was made, and that his work was all done under it before the act of 1873 was passed.

But the decree of 16th of March, 1875, was a merger of the former contract, and was rendered while the act of 1873 was in force.

Mason vs. Eldred, 6 Wallace, 231.
Eldred vs. Bank, 17 Wallace, 545.

And would not the court, under the circumstances of this case, if necessary to afford Brown a remedy, consider that decree as in effect a new contract, made while the act of 18th of March, 1873, was in force, at least, so far as to prevent the Legislature from taking away the power to enforce the payment of the money the decree has determined the city ought to pay him?

It ought to be, under the circumstances, just as completely beyond the power of the Legislature to repeal the act of 1873, so far as it affected Brown's remedy to enforce the payment of the decree, as it would have been had the contracts for laying down the paving been made after the act of 1873 was passed.

When the pavement was laid down the contractors and the city relied upon contracts which, while they bound the city to pay the entire cost of the pavement, undertook to charge the cost in the first instance directly on the property abutting the streets paved, to be apportioned amongst the property owners according to the frontage of their lots on the streets paved, and which contracts contained express guarantees by the city that the several property owners would pay the portions of the cost apportioned to them respectively under the contracts. By the contracts the whole pavement was to be paid for within ninety days after its completion.

The contracts had been made in pursuance of an act of the Legislature of the State of Tennessee, the substance of which had been in the charter of the City of Memphis for more than ten years. The principle of the act had been sanctioned by two or three different Legislatures, and was understood to have been sustained by the Supreme Court in more than one express adjudication. See Mayor, etc., vs. Mabry, 6 Humphreys, 368; Washington vs. Mayor, etc., 1 Swan, 177; Whyte vs. Mayor, etc., 2 Swan,

364. Besides, the practice in the State of Tennessee, so far as the grading and paving of sidewalks were concerned, had always been, and is yet, to charge the cost exclusively on the owner of the abutting property.

The act not only expressly authorized the contracts, but in terms provided the mode of assessment on the abutting property by the frontage of the lots, and prescribed remedies against the owners for the collection of the sums so assessed. The contractors and the city in making the contracts and doing the work relied upon the remedies thus provided to collect the cost of the pavement.

After the work had all been done, and had been accepted and was in use by the public, the Supreme Court of Tennessee held that the assessments on the abutting property were void, and that there was no lawful remedy to collect from the property owners the sums that had been apportioned to them. This left Brown without the means of obtaining payment of the unpaid part of the cost of the pavement, except from the city, against which the suit (in which the decree of 16th of March, 1875, was afterwards rendered) was already pending.

Thereupon the Legislature, in view of the facts, passed the act of 18th of March, 1873, Acts of 1873, ch. 67, p. 102, which gave the city the power to levy a tax in addition to all other taxes allowed by law to be levied sufficient in amount to pay Brown and all others situated as he was the sums due them.

Brown's suit against the city, just mentioned, was on its general undertaking to pay, contained in the contracts, as well as on its guarantees therein contained of payment by the property owners of the proportions of the cost of the pavement set apart to them; as already observed and on the 16th of March, 1875, after the passage of the act of 18th of March, 1873, and before its repeal, he recovered the decree already mentioned.

Now, I contend that under this state of facts, if it was necessary to do so in order to afford Brown a remedy to collect his decree, the court would hold that the remedy provided by the act of 18th of March, 1873, took the place and was in lieu of and a substitute for the unlawful remedies against the owners of the abutting

property nominally provided by the act under which the contracts were made for collecting the cost of the pavement, and that the remedy provided by the act of 1873, by the levy of the tax therein provided for, upon the passage of the act became incorporated with and entered into and formed a part of those contracts in such a sense that subsequent legislation could not take it away, if thereby Brown was left without an adequate substantial remedy for the enforcement of the decree.

Steamship Company vs. Joliffe, 2 Wallace, 450.

In Brooks vs. City of Memphis, 3 Central Law Journal, 356, a branch of the present case, before Emmons, circuit judge, he declared:

"The Legislature, in the performance of a high moral and political duty, had substituted the act of 1873 for the invalid law. It had honestly failed in its duty, misled and deceived the citizens into the expenditure of many hundreds of thousands of dollars, placed upon the streets and used by the complaining and other taxpayers of Memphis. As a judge, he felt disposed to accept this honest political action of the sovereign power. He would hold the new law where the Legislature had placed it, exactly in the stead of the unconstitutional enactment. And, although quite aware none of the judgments upon this subject constituted precise precedents for such a ruling, he hoped a superior court would find in their principle a justification for treating this remedy as if it existed at the date of the contract. * * * * *

It is the duty in all cases to follow the Legislative intent. There can be no doubt it was most substantially the will of the Legislature, in the enactment of the law of 1873, to afford a remedy specially for such cases as that before the court. So far as it had power, the object undoubtedly was to place citizens who had been wronged by its unconstitutional action in the exact legal and financial condition they would have been had the Legislature legislated rightfully in the outset and passed the law of 1873, or a substitute for it, in place of that which had been declared void. The court which treats it differently will war with the political policy of the State, as clearly expressed by this statute. That, for some unexplained reason, this better policy changed, and the power of keeping promises was repealed, is of no consequence to this argument.

If the right once existed to collect this judgment, then he thought a right application of principles laid down by the court of last resort, and a better reading of the State constitution forbade an ill-timed repentance on the part of the Legislature, and entitled the suitor in courts of justice to the remedies provided for the collection of his judgment, unless an equivalent and reasonable one was given in their stead."

3 Central L. J., p. 358.

And see what this court said in reference to the position and rights of Brown and the city in 20 Wallace, p. 309–312,

It is true this court has in several cases recognized the power of Congress, by a general law limiting its jurisdiction, to withdraw from it a pending case of which, before the enactment of the law, it had jurisdiction.

McCardle ex-parte, 7 Wallace, 506.

But a State Legislature can not take away the jurisdiction of a Federal court.

And I know of no case recognizing a power in the Legislature of a State to withdraw from a court of the United States a suit pending in it by repealing the statute conferring the right to maintain the particular suit, or by any other species of legislation.

Riggs vs. Johnson County, 6 Wallace, 166.

Supervisors vs. Durant, 9 Wallace, 409.

In this case Brown had a suit pending in the Circuit Court of the United States, and a complete right to the relief he asked. Admit that his right to maintain the suit depended, when he began the suit, on a statute of the State. Still, that statute had the effect of giving him the right to sue in the Federal Court, not by virtue of any inherent power in itself as the declaration of the will of the Legislature of the State of Tennesseee, but because the State statute had been adopted by the act of Congress, and was thereby made the law of the Federal Court. From this last circumstance, the adoption by Congress, the statute derived all its force. While his suit was so pending, the State law giving the particular remedy he had adopted and was pursuing in the court of the United States was repealed by the Legislature of Tennessee, without the sanction or agency of

thereupon filed under the act, and the cause prepared for hearing. The Legislature then passed another act declaring that the former act, under which the bill had been filed, should not be so construed as to extend to any case existing before it's passage, and that in all such cases, where bills were pending under the act, the same should be stricken from the docket.

The court held that the last act was unconstitutional and void.

The principle of the decision, as announced by Chancellor Reese, whose opinion was adopted by the court, is as follows:

"A distinction between the right and the remedy is made and exists. But where the remedy has attached itself to the right, and is being prosecuted by due course of law to separate between them and take away the remedy, is to do violence to the right, and comes within the reason of that provision of our constitution which prohibits retrospective, or, in other words, retroactive, laws from being passed, or laws impairing the obligation of contracts."
6 Yerger, * p. 138.

And see what Judges Catron and Peck said on the petition for rehearing. 6 Yerger * p. 159-161, 162-167.

The principle of the case of Wally's heirs vs. Kennedy, 2 Yerger, * 554, is substantially the same.

And in Jones vs. Perry, 10 Yerger, 59, 79-80, the case of Fisher's Negroes vs. Dabbs is stated and approved.

Tucker vs. Burns, 2 Swan 35, is a similar case.

An action of forcible entry and detainer for the recovery of land was pending, and, by the pre-existing law, was liable to be abated by the death of either party. The Legislature passed an act that actions of forcible entry and detainer might be revived in the names of the heirs or legal representatives of the decedent, and that the act should apply to pending suits. The plaintiff died, and his death was suggested and proved, and it was sought to revive the suit in the name of his heirs, under the authority of the act of the Legislature, which had been passed after the plaintiff's death. The

court below refused to allow the revivor, and the Supreme Court affirmed the judgment on the ground that to allow it would be to give the act of the Legislature retrospective or retroactive and therefore unconstitutional operation.

And see to the same general effect—

School Commissioners vs. the State, 7 Humphreys, 113.
Gaines vs. Catron, 1 Humphreys, 515.
Yancy vs. Yancy, 5 Heiskell, 353, 357–365.
Richardson vs. Wilson, 8 Yerger, 67, 79–83.
Vanzant vs. Waddell, 2 Yerger, 260.
Hannum vs. Bank of Tennessee, 1 Coldwell, p. 398, 400–403.
Greenfield vs. Dorris, 1 Sneed, 548.
And see the cases cited by Mr. Sharkey in his brief in Ex Parte McCardle, 7 Wallace, 510–511.

6. The Code of Tennessee, sec. 49, provides—

"The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

This section prescribes a general rule applicable to the construction of all repealing statutes, and is not confined to the repealing statutes contained in the Code, as their operation had been prescribed by sections 44, 45, 46 and 47 preceding, which are similar to sec. 49 and in terms apply only to the Code.

In Richardson vs. the State, 3 Coldwell, p. 122, the court held that a prosecution for a criminal offense instituted under a statute did not fall by the repeal of the statute, but might under the above section 49 of the Code be prosecuted to conviction after the repeal, and punishment inflicted.

The rule was quite different before the statute, as may be seen by reference to the case of Norris vs. Crocker, 13 Howard, 429.

In Wood vs. Orr, 10 Yerger, 505, an execution was placed in the hands of a sheriff, who failed to return it as prescribed by law. At the time of this default there was no law giving the plaintiff in the execution a right to a summary motion against the sheriff for

thereupon filed under the act, and the cause prepared for hearing. The Legislature then passed another act declaring that the former act, under which the bill had been filed, should not be so construed as to extend to any case existing before it's passage, and that in all such cases, where bills were pending under the act, the same should be stricken from the docket.

The court held that the last act was unconstitutional and void.

The principle of the decision, as announced by Chancellor Reese, whose opinion was adopted by the court, is as follows:

"A distinction between the right and the remedy is made and exists. But where the remedy has attached itself to the right, and is being prosecuted by due course of law to separate between them and take away the remedy, is to do violence to the right, and comes within the reason of that provision of our constitution which prohibits retrospective, or, in other words, retroactive, laws from being passed, or laws impairing the obligation of contracts."
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Tucker vs. Burns, 2 Swan 35, is a similar case.

An action of forcible entry and detainer for the recovery of land was pending, and, by the pre-existing law, was liable to be abated by the death of either party. The Legislature passed an act that actions of forcible entry and detainer might be revived in the names of the heirs or legal representatives of the decedent, and that the act should apply to pending suits. The plaintiff died, and his death was suggested and proved, and it was sought to revive the suit in the name of his heirs, under the authority of the act of the Legislature, which had been passed after the plaintiff's death. The

court below refused to allow the revivor, and the Supreme Court affirmed the judgment on the ground that to allow it would be to give the act of the Legislature retrospective or retroactive and therefore unconstitutional operation.

And see to the same general effect—

School Commissioners vs. the State, 7 Humphreys, 113.
Gaines vs. Catron, 1 Humphreys, 515.
Yancy vs. Yancy, 5 Heiskell, 353, 357–365.
Richardson vs. Wilson, 8 Yerger, 67, 79–83.
Vanzant vs. Waddell, 2 Yerger, 260.
Hannum vs. Bank of Tennessee, 1 Coldwell, p. 398, 400–403.
Greenfield vs. Dorris, 1 Sneed, 548.
And see the cases cited by Mr. Sharkey in his brief in Ex Parte McCardle, 7 Wallace, 510–511.

6. The Code of Tennessee, sec. 49, provides—

"The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

This section prescribes a general rule applicable to the construction of all repealing statutes, and is not confined to the repealing statutes contained in the Code, as their operation had been prescribed by sections 44, 45, 46 and 47 preceding, which are similar to sec. 49 and in terms apply only to the Code.

In Richardson vs. the State, 3 Coldwell, p. 122, the court held that a prosecution for a criminal offense instituted under a statute did not fall by the repeal of the statute, but might under the above section 49 of the Code be prosecuted to conviction after the repeal, and punishment inflicted.

The rule was quite different before the statute, as may be seen by reference to the case of Norris vs. Crocker, 13 Howard, 429.

In Wood vs. Orr, 10 Yerger, 505, an execution was placed in the hands of a sheriff, who failed to return it as prescribed by law. At the time of this default there was no law giving the plaintiff in the execution a right to a summary motion against the sheriff for

the non-return of the execution, nor prescribing the extent of the recovery that might be had against the sheriff on such motion.

The Legislature then passed a law giving the remedy by motion and prescribing the recovery that the plaintiff was entitled to on the motion. And the act in terms applied to the defaults which had already occurred as well as those to occur in future.

The court decided that the act could not be allowed to have a retroactive application to cases of pre-existing default, and overruled the motion, admitting at the same time, however, that the sheriff would be liable without the statute to an action for the failure to return the execution in which action such damages as the plaintiff had sustained by reason of the default might have been recovered.

In Hannum vs. Bank of Tennessee, 1 Coldwell, p. 398, 401–403, is a full recognition of the principle and a citation of authorities.

The question there was whether a statute forbidding a bank to pay interest on deposits was to be confined to deposits made after the statute was passed, or embraced deposits made before that time where the bank had contracted to pay interest on them.

The court held the latter class of deposits not affected by the statute.

There is nothing in the act repealing the act of 18th of March, 1873, indicating the Legislature intended the repeal should have a retroactive effect.

Acts of 1875, ch. 92, sec. 81, p. 167–168.

The general rule is that a statute is to be given a prospective operation only, unless its terms show a legislative intent that it should have a retrospective effect.

Cooley's Constitutional limitations, * p. 370 and cases cited.

In United States vs. Heath, 3 Cranch, * p. 399, a statute enacting that in lieu of commissions theretofore allowed there should, after a prescribed future date, be allowed to certain designated collectors a less rate of commissions on all moneys which should be

collected and received by them for duties on imported goods and on tonnage, was held not to affect the commissions of collectors upon moneys received for duties on goods imported before the act was passed, though such moneys were not received until after the date on which the reduction of the rate of commissions took effect.

In McEwen vs. Den, 24 Howard, 242, it was held that an act of the Legislature of the State of Tennessee providing that the probate of deeds, acknowledged or proved before the clerk of any court of record in any of the other States which had not been authorized before, and certified in a certain way, should be valid, and that the deeds might be registered, and should be good to pass title, was prospective only, and did not apply to deeds made before its passage. Judge Catron delivering the opinion, said: "To hold otherwise * * * would violate a general rule of jurisprudence, to-wit: that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction unless the contrary clearly appears."

24 Howard, 244.

In Steamship Company vs. Joliffe, 2 Wallace, 450, the following principle is stated:

"When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, which stands independent of the statute."

2 Wallace, 456–458.

The principle was in that case applied to a claim of a pilot for half pilotage, where, upon a ship's entering the port of San Francisco, he tendered his services and the ship refused them, and he brought suit and recovered a judgment, and pending a writ of error from the judgment to the Supreme Court of the United States the statute giving the pilot the right to demand the pilotage was repealed. The court held the repeal did not affect the judgment nor the right.

The judges who dissented in that case, while they denied the

application of the principle to the facts before the court, do not, as I understand them, deny the correctness of the principle itself.

7 But leaving the act of 18th of March, 1873. and the act of 16th of January, 1871, and all other express statutory grants of power to levy the tax quite out of view, I still insist the court will find in the facts a sufficient authority to justify the levy to the extent that it may be necessary to pay Brown's decree.

It has been settled by the adjudication of this court that the City of Memphis had the power to create the particular debt to Brown involved in this case, in the precise manner in which it was created.

City of Memphis vs. Brown, 20 Wallace, 289, 309–311.

In Loan Association vs. Topeka, 20 Wallace, 655, it was decided that, except in exceptional instances, "the proposition is a very broad one that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, *imply* an obligation to pay by taxation. * * * * * It is therefore to be inferred that when the Legislature of the State authorizes a county or city to contract a debt by bond it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself or in some general statute a limitation upon the power of taxation which repels such an inference."

20 Wallace, p. 660.
And see Commonwealth vs. Commissioners, 37 Penna. St. R., p. 277, 290.
Commonwealth vs. Commissioners, 40 Penna. St., 348, 350–351.
Commonwealth vs. Perkins, 43 Penna. St. 400, 403.
State vs. Milwaukee, 25 Wisconsin, 122.

In Brooks vs. City of Memphis, 3 Central Law Journal, p. 356, where Judge Emmons had to pass upon the question, he laid down this principle:

"From an express grant of power to a municipal corporation to create a debt for a specified purpose, a power of taxation for its payment will, in the absence of other adequate means of payment,

be implied, although at the date of such grant there is a statutory limitation upon the corporation's general power of taxation."

BAR ASSOCIATION

The adjudications in Tennessee leave no room to doubt that the doctrine just stated is the law of the State.

In Nichol vs. Mayor, etc., 9 Humphreys, p. 252, after stating the general rule that a corporation is the creature of the Legislature, and can exercise such powers only as are granted to it, the court adds, "and such as are the result of necessary and proper implication."

9 Humphreys, p. 261.

And the court says further: "But this strict construction has never confined the execution of the power to its words and letter, but everything necessary and proper for carrying into execution the granted power has always been conceded by the strictest constructionist."

9 Humphreys, 262.

The act in question in that case authorized Nashville to subscribe for stock in a railroad company, and to provide for the payment of the subscription by either of two ways—

First—By borrowing money on the faith of the corporation and hypothecating the corporation taxes as security for it; and, Second—By issuing bonds for the whole or any part of the stock subscribed for as the calls might be made.

The court conceded that the first mode involved the necessity of raising the money necessary by taxation, but said it was not certain that the means to be provided by the second mode required taxation, as the bonds to be executed might not have to be met by taxation. However, the court seemed to admit that it was quite probable that the bonds also would have to be paid by taxation.

9 Humph., 267.

And the conclusion was that the Legislature had the constitutional power to authorize the subscription for the stock, and that Nashville was legally authorized to pay the subscription for stock in either of the modes pointed out by the act.

9 Humph., 271.

In City of Memphis vs. Memphis Gayoso Gas Company, 9 Heiskell, p. 531, the doctrine of the case of Nichol vs. the Mayor, etc., was fully approved.

In that case the court cited and approved what Judge McKinney said in Cook vs. S. S. & M. Co., 1 Sneed, 698, 714–715, as follows. "In ascertaining the extent of the power to levy and collect taxes delegated to the corporation, we must look to the general powers specifically granted, and such as result by necessary implication from the various objects contemplated by the charter, and the duties enjoined therein; and as far as the proper exercise of these powers and the accomplishment and performance of the various objects and duties may require, but no further, may the power to raise money by taxation be exercised under the charter."

9 Heiskell, p. 534.

And from the fact that the city had power to light the streets, to purchase and hold real estate for gas works, and to do all things a natural person might do touching the same, the court concluded it had the power to subscribe for stock in a corporation chartered for the purpose of manufacturing and selling gas within the city for profit as one mode of exercising its power to light the city.

The doctrine of these cases is fully approved in Adams vs. the Memphis and Little Rock Railroad Company, 2 Coldw., 645, and in Memphis vs. Adams, 9 Heiskell, 518, 525–526.

The general doctrine as laid down by Judge Dillon is as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: *First*, those granted in express words; *second*, those *necessarily* or *fairly* implied in or *incidental* to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation."

Dillon on Municipal Corporations, sec. 55.

In Newman vs. Justices of Scott County, 5 Sneed R., 695, a case where it was sought to compel by mandamus the levy of a tax to pay judgments against a county, the Supreme Court of Tennessee said, after stating the power of the county to contract certain debts:

"And as taxation is the appropriate means of raising funds for the discharge of such debts, the power to impose taxes for such purposes has been conferred, generally, upon the Justices of the County Court. * * * * * Was it deliberately designed that these *quasi* corporations should be invested with the power to create debts for legitimate and indispensable county purposes, and yet be absolved from all legal obligation, and placed beyond the power of coercion to discharge *such debts?* We do not so understand the constitutional provision in question.

The power was given, not merely that it *might*, but that it *should* be exercised in the cases contemplated by the Constitution. The *grant of the power* to raise money in this mode, for the discharge of county liabilities, carries along with it, by necessary implication, the *obligation* to do so. If it be competent to the Legislature to empower the counties to impose a tax, and dictate the manner in which it shall be done, surely it can provide for the exercise of the power. If not, the authority to delegate such power to the counties is unmeaning and illusory, and practically, the creditors of the county are left without remedy. To this conclusion we would regret exceedingly to be forced."

The court then said further that the legislation attacked was conititutional, and more, "was a most just and salutary law, manifesting a determined spirit of opposition *in limine*, to everything that savors of *repudiation* in law, as well as in high places."

5 Sneed, p. 700–701.

In Mayor, etc. vs. Dixon, 8 Heiskell, 864, the debt had been created for paving the streets of Bristol, and was in judgment and the question was whether a tax could be compelled by mandamus to pay the judgment. The defense rested on the ground that the town had assessed a tax for its ordinary expenses equal in rate to the State tax, which was insufficient to pay the judgment, and having exhausted its powers of taxation under the law it had no authority to make an additional assessment. The grant of powers in the charter embraced "having and keeping in repair the streets," and "levying and collecting taxes for the purpose of carrying the necessary measures into operation for the benefit of the town."

The court held that these powers authorized the contracting of

the debt for the paving of the streets and the levy of a special tax to pay it, if the general tax was not sufficient for the purpose; and that in levying the tax the town might exceed the rate levied by the State. The court said, speaking of the powers of the Mayor and Aldermen:

"They have the power to order such improvements and repairs in the streets as in the irjudgment are necessary and proper for the comfort and convenience of their constituents, and to contract such debts therefor as may be proper in their discretion, to accomplish the objects. To satisfy the debts so contracted they have ample power to levy and collect the necessary amount of taxes. The taxes so levied and collected *require no special power*, nor are they such special taxes as are subject to legislative restrictions. * * * * * * Having ordered the work and contracted the debts, the obligation to make the assessment and collection of taxes at once arises, and upon their refusal to do so a resort to the remedy by mandamus is proper."—8 Heiskell, 871.

If the question as to the authority of the city to contract the debt to Brown for laying down the pavement, precisely as it did, be not concluded, a reference to the legislation on the subject will show the authority was ample for the purpose.

By sec. 7, article IV, of the act to amend the charter of Memphis, passed on the 13th of February, 1854, Acts of 1853–1854 (private), ch 195, p. 285, it was provided that the city should have power "To improve, preserve and keep in good repair the streets, sidewalks, public landings and squares in the city."

This language is repeated, almost word for word, in sec. 46 of the act of December 1st, 1869, Acts of 1869–1870, ch. 26, p. 235 (private).

The act of 29th of February, 1856, Acts of 1855–1856, ch. 263 (private), p. 532, sec. 11, gave the additional power to the Board of Mayor and Aldernen to provide by ordinance for the grading and paving of all the streets, lanes, alleys and avenues in the city by the respective owners of real estate fronting thereon, and to enforce obedience to said ordinance by such fines and forfeitures

as they might provide, to be assessed and collected as other fines and forfeitures."

Section 49 of the act of December 1st, 1869, Acts of 1869–1870, ch. 26, p. 236, contains substantially the same provision.

By the act of 20th of February, 1860, Acts of 1859–1860, ch. 70, p. 282–283, sec. 7, it was provided "as another mode for the construction of permanent streets in said City of Memphis" it should have power upon a prescribed petition from a certain proportion of the owners and holders of the real estate fronting on any street, or part of street, to provide by ordinance for the levying, assessing and collection of a uniform special tax per foot on all the property fronting on such street or part of street for the purpose of paying for the construction and paving of such street or part of street with stone, iron or such other durable or lasting material as should be designated by the petitioners. It might provide in the ordinance that a part of the cost of the pavement, not exceeding one-fourth, should be paid from the general revenue of the city. And the special tax so provided for, it was declared, should be in addition to the other corporation taxes on such property; and that additional levies and assessments might be made from time to time until a sufficient sum was raised to pay for the work.

The act of 24th November, 1866, Acts of 1866–1867, (private) ch. 8, Sec. 4, p. 19–20, authorized the city to require the cost of paving the entire carriage way, gutters included, of any street, or portion of any street, or alley, to be borne by the owners of the adjoining property. It was authorized when it deemed it necessary, or when the owners of the major part of the lots fronting on such street petitioned for it, to prescribe by ordinance the manner of grading and paving any street, and cause the work to be done. And the act declared that the cost should be borne by the owners of the adjoining property and be paid by them like liabilities contracted by themselves, and should be apportioned and charged and be a lien on the adjoining lots in proportion to their respective fronts. It then prescribed the mode to be pursued in contracting for and having the work done, and the manner of apportioning the cost of it amongst those liable for its payment, and the course to be adopted in collecting the cost.

This is the substance of the enactment. It may be seen in Taylor vs. Chandler, 9 Heiskell, 349, and City of Memphis vs. Brown, 20 Wallace, 289.

It is also contained in sec. 50 of the act of 1st of December, 1869, Acts of 1869–1870, ch. 26, p. 237 (private).

This court in City of Memphis vs. Brown, 20 Wallace, 289, 310, said:

"These references show full authority in the city to make contracts for paving, to be paid for in cash, as was done in the first contracts, or in the bonds of the city, as was done in the case of the second contracts. General power and authority over the subject is by law given to the city, and the power also vested in the city, to require that the cost may be assessed upon the adjoining owners, does not impair the power of the city itself to do the work. It is permissive merely. The city may require the owners to pay, but it is not compelled to do so."

By section 2, article I, of the amended charter of 1854, Acts of 1853–1854 (private), ch. 195, p. 285, after reciting certain specific powers the city possessed, it was further declared: "And may do and perform all other acts as natural persons."

This provision was a part of the charter of the City of Memphis, at least, down to the act of 23d of March, 1875, Acts of 1875, ch. 92, sec. 81, p. 167–168, and was repeated in exact words in the act of 1st of December, 1869, Acts of 1869–1870 (private), ch. 26, p. 225, sec. 1, near the end.

I do not insist that this general language could of itself confer on the city a substantive, independent power it would not otherwise possess. But I *do* insist that when it is established that a purpose sought to be accomplished is a corporate purpose, it confers expressly what possibly might exist without such express grant, the power to carry into effect such purpose by any means an individual similarly circumstanced who seeks to accomplish the same end, might adopt.

2 Kent Com., * p. 278, note.

Memphis vs. Gayoso Gas Co., 9 Heiskell, p. 531, 538.

Taxation being the only mode by which the city could raise the money to pay for the pavement, and there being no way to pave the streets except by paying the cost of the paving, it necessarily follows that the power to impose the tax to pay the cost is to be implied from the power to construct the pavement.

II

The third assignment of errors is that the court erred in "adjudging that the tax to be levied should be payable only in lawful money of the United States." It claims that under the act of 18th of March, 1873, the sums paid by persons in satisfaction of the special assessments illegally levied and collected to pay the cost of the pavement might be received in payment of such tax.

1. The decree rendered by the Circuit Court on the 16th of March, 1875, was payable only in lawful money of the United States. A tax to satisfy it must therefore be payable in the same medium and no other.

2. The act of 18th of March, 1873, did not give the absolute right to pay the tax to be levied under its provisions in the sums which had been paid in satisfaction of the special assessments. It merely *permitted* the city in levying such tax to allow such sums as payments. It is not claimed that the city in levying the tax to pay Brown agreed to allow any sums paid in satisfaction of special assessments as payments upon the tax. And sec. 3 of the act of 2d of March, 1870, Acts of 1869–1870, ch. 117 (private), p. 632, expressly made all taxes assessed by the City of Memphis payable in the lawful currency of the United States.

3. It was only when a tax "sufficient to cover the entire cost of improvement, with interest thereon, for which the said assessments were illegally made," that the city was authorized to permit the sums which had been paid in satisfaction of the assessments to be received as payments on the tax. The act did not intend that a tax levied at the instance of a particular contractor, Brown for instance, *not* to pay the entire cost of the improvement, but only to pay *the balance* due him for laying down the pavement, should be paid in sums which had been previously paid in satisfaction of the illegal special assessments. Such payments could be of no manner of

use to Brown, and the judgment, and the compulsory levy of a tax to pay it would be a mere farce, if they are to be allowed.

4. There is nothing to show that the tax to pay Brown's decree was in fact levied under the provisions of the act of 18th of March, 1873. Ample power for the levy the tax was to be derived from other sources, as already shown, and for anything appearing to the contrary the levy was made under such other power.

5. On the 30th March, 1875, when the judgment requiring the levy the tax to pay Brown's decree was rendered, the act of 18th March, 1873, had been repealed by sections 81 and 82 of ch. 92 of the Acts of 1875, p. 167–168. Of the power of the Legislature to repeal the act, so far as it affected *the mode* in which the tax authorized by it might be paid, that is to say, so far as it authorized the city to allow the sums which had been paid in satisfaction of the special assessments, as payments on the tax, no doubt can be entertained. It necessarily follows that the judgment was right in making no provision for payments in sums which had been paid in satisfaction of the special assessments.

This point is fully argued in the brief for the plaintiff in error in No. 778, Brown vs. The City of Memphis, submitted along with this case, at pages 20–25, to which I here refer.

III

Another error assigned is that the past levies to pay Brown's decree, which remained uncollected, were not considered in requiring the levy the judgment of 30th March, 1875, commanded.

Of these levies it may be observed, first, that none of them were made to pay the decree of 16th March, 1875, rendered in pursuance of the mandate of this court. All of them were made before that decree was rendered, and for the purpose of paying the decree of March, 1872, which was reversed by this court, or else the debt, after the reversal of that decree.

But aside from this, it was proper that the court should take no account of the past levies, which had not been collected, and probably never would be.

This court has decided the precise question.
Benbow vs. Iowa City, 7 Wallace, 313.
And see State vs. Madison, 15 Wisconsin, 10.
High on Extraordinary Legal Remedies, Sec. 379.

It *is* now, and always has been in the power of the city to relieve itself from the necessity of making the levies commanded by the judgment of 30th March, 1875, by simply paying the decree of 16th March, 1875. It may raise the money to pay it out of the past levies, or from any other source. And as soon as the sum due on the decree is paid the judgment commanding the levy and collection of a tax to pay it falls of itself. But whether it does or not, it will be in the power of the Circuit Court, the moment it is made to appear that enough money has been collected to render further levies unnecessary, to so modify or control the execution of the judgment commanding the levies as to dispense with them.

Indeed the judgment itself commands only the levy and collection of what may be necessary to pay the decree.

The city does not discharge its duty by merely levying a tax to pay a judgment. It must collect it, and pay it over. And, so far from the existence of a large amount of past levies to pay a judgment remaining uncollected being evidenced that the city has performed its duty, the fact is proof of a failure to perform.

IV

It is assigned as error that the judgment commanded the city to levy a tax sufficient in amount to pay Brown's decree, "after making due allowance for all delinquencies, insolvencies and defaults."

I do not see the force of this objection. It was left entirely to the city to determine *what allowance*, if any, it would make for the delinquencies, insolvencies and defaults. It is to be presumed it would make such allowance only as the facts and the law authorized—that is due allowance.

The delinquencies, insolvencies and defaults referred to in the judgment were such as the law would recognize—in other words, such as would necessarily exist after every lawful effort in the power of the city to collect the taxes in the particular cases had been ex-

hausted and no collection had been or could be effected. That there are always such cases everybody knows.

And when the impossibility of collecting any portion of the taxes levied is established, those particular taxes are necessarily released—or in commercial parlance, are charged to profit and loss—and the burden of paying the amount of them is shifted upon the tax payers who will pay or can be forced to pay.

What error there could have been in taking notice of what would inevitably occur, and providing for it, as was done when the city was directed in making the levies of taxes to make due allowance for the delinquencies, insolvencies and defaults, I am at a loss to conjecture.

V

It is not assigned as error, but in the city's return to the alternative writ the defense that in the Ninth and Tenth wards of the city it was not in its power to levy the tax it was commanded to levy by the alternative writ is set up.

This question is presented in case No. 778, submitted along with this, Brown vs. the City of Memphis, and if the court looks to it in this case, I refer to my brief in that case, pages 11–18, for what I have to say upon it.

VI

It is also set up as a defense in the city's return to the alternative writ, though no error is assigned upon it, that the persons who had paid the illegal special assessments levied to pay the cost of the pavement were by the act of 18th of March, 1873, entitled to be excused or released from paying the tax levied to pay the cost of the pavement.

If this question is to be considered in this case, I refer to my brief in No. 778, Brown vs. City of Memphis, submitted along with this, pages 18–30, where it is discussed.

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